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ONTARIO LABOUR RELATIONS BOARD REPORTS

May/June 1998



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Bimonthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1998] OLRB REP. MAY/JUNE

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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Public Sector Labour Relations Transition Act - Board ruling that nursing unit at successor hospital should not include registered practical nurses - Board ruling that separate trades bargaining unit not appropriate - Parties subsequently agreeing that there should be three bargaining units at successor hospital described in general terms as bargaining unit of registered and graduate nurses, a bargaining unit of paramedical employees, and a bargaining unit of service, office and clerical, and trades employees

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Public Sector Labour Relations Transition Act - Certification - CHCW applying to represent bargaining unit of service workers employed by WCA and already represented by SEIU - SEIU subsequently filing application under Public Sector Labour Relations Transition Act ("PSLRTA") and asking Board to exercise its discretion to find that that Act applies under section 9 of the Act - SEIU also asking Board to establish "changeover date" retroactive to a date preceding the certification application date - SEIU asking Board to find that certification application made by CHCW barred under section 28(4) of PSLRTA - Board declining to find that PSLRTA applies or that certification application would be barred, if it did - Application under PSLRTA dismissed - Board directing that ballots cast in certification application be counted

WOMEN'S CHRISTIAN ASSOCIATION OF LONDON ("WCA"); RE CANADIAN HEALTH CARE WORKERS ("CHCW"); RE LONDON & DISTRICT SERVICE WORKERS' UNION, LOCAL 220 ("SEIU" OR "THE INCUMBENT UNION"), ST. JOSEPH'S HEALTH CENTRE

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TORONTO PUBLIC PARKING AUTHORITY, CORPORATION OF THE CITY OF TORONTO (IN ITS OWN CAPACITY AND C.O.B. AS THE); RE TORONTO CIVIC EMPLOYEES' UNION, LOCAL 416, CUPE; RE CUPE, LOCAL 79

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TORONTO DISTRICT SCHOOL BOARD, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 102, CUPE, LOCAL 4400, OLRB; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA 523

Reconsideration - Conciliation - Termination - Timeliness - Employee filing termination application more than 12 months after conciliation officer appointed, but Minister not yet having issued "no board" report - Board concluding that termination application untimely under section 67(2) - Termination application and reconsideration application dismissed

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Related Employer - Remedies - Board declaring various entities involved in retirement home business to be single employer for purposes of the Act - Board declining to issue declaration against the principal of several corporate entities included in the declaration - Board not satisfied that a declaration against the corporate entities' principal would further the goals of the Act's related employer provision

LIVINGSTON LODGE & NUTRA 2000, MEADOWCROFT C.O.B. AS; RE CUPE..... 430

Remedies - Health and Safety - Correctional officer employed at maximum security holding facility twice suspended for engaging in work refusal - Board finding that correctional officer was acting in compliance with Occupational Health and Safety Act and seeking its enforcement when engaging in work refusal - Employer violating section 50(1) of the Act - Board directing that suspension be removed from employee's record, that employee be compensated for all losses and that employer post Board notice in the workplace

CROWN IN RIGHT OF ONTARIO, THE, (MINISTRY OF SOLICITOR GENERAL AND CORRECTIONAL SERVICES (METROPOLITAN TORONTO WEST DETENTION CENTRE)), R.D. PHILLIPSON, NELSON CARDOZA AND MICHAEL CONRY; RE OPSEU AND JAMES SLACK..... 382

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that the failure of the applicant to file a copy of its intended main application amounted to non-compliance with the rules, but that it was appropriate to relieve against the failure to comply with the rules in this case - Board to reconvene consultation to hear submissions with respect to balance of harm, convenience or prejudice that might flow from granting or withholding interim relief sought

TORONTO PUBLIC PARKING AUTHORITY, CORPORATION OF THE CITY OF TORONTO (IN ITS OWN CAPACITY AND C.O.B. AS THE; RE TORONTO CIVIC EMPLOYEES' UNION, LOCAL 416, CUPE; RE CUPE, LOCAL 79 484

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TORONTO DISTRICT SCHOOL BOARD, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 102, CUPE, LOCAL 4400, OLRB; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA 523

Representation Vote - Certification - Following representation vote in certification application, certain employees raising concerns that some objecting employees had not had adequate notice of the vote, had to wait in line to vote, and had been unable to cast ballot before having to leave to write an exam, that the union had not spoken to them about the organizing drive, or that no one had contacted them directly about vote arrangements - Board satisfied that allegations, even if true, would not change result of application - Certificate issuing

BROCK UNIVERSITY; RE CUPE; RE GROUP OF EMPLOYEES 361

Representation Vote - Certification - Certification Where Act contravened - Charter of Rights - Constitutional Law - Judicial Review - Board concluding that conduct of employer in circulating amongst employees and engaging them in individual and group discussions regarding the union violating section 70 of the Act - Employer's refusal to answer questions regarding closing of store if union certified amounting to intentionally generated implied threat to employees' job security and also violating the Act - Board concluding that results of representation vote not disclosing employees' true wishes, that no remedy short of automatic certification sufficient to counter effect of employer contraventions, and that union holding membership support sufficient for collective bargaining - Union certified under section 11 of the Act - Application for judicial review brought by employer and by objecting employees dismissed by Divisional Court - Application for leave to appeal dismissed by Court of Appeal and by Supreme Court of Canada

WAL-MART CANADA INC.; RE USWA AND OLRB 524

Representation Vote - Certification - Construction Industry - Intimidation and Coercion - Unfair Labour Practice - Employer asking Board not to give effect to result of representation vote and to dismiss union's application for certification under section 11(2) of the Act on grounds of alleged intimidation of employees - Employer also asserting that employee denied reasonable opportunity to vote as result of union misrepresentation - Employer also asking Board to dismiss application because only one of two eligible voters cast ballots - Board satisfied that there was no unlawful intimidation, that the employees had an adequate opportunity to vote, and that section 10(2) of the Act does not require more than one employee to cast ballots in a representation vote before the Board can give effect to that vote - Certificate issuing	
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Termination - Charter of Rights - Constitutional Law - Construction Industry - Injured employee in receipt of workers' compensation benefits and therefore not at work applying to terminate union's construction industry bargaining rights - Applicant challenging requirement that individual be working in bargaining unit on date of application in order to bring a termination application in the construction industry - Board rejecting submission that that requirement discriminates against him on grounds of disability contrary to Charter of Rights and Human Rights Code - Application dismissed	
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KIBALE, GUILLAUME; RE UNIVERSITY OF OTTAWA AND THE ASSOCIATION OF PART-TIME PROFESSORS OF THE UNIVERSITY OF OTTAWA

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Voluntary Recognition - Certification - Evidence - Practice and Procedure - Applicant and intervenor disputing whether restriction on use or disclosure of document produced by intervenor to applicant should continue after document entered into evidence - Board concluding that implied undertaking will not limit use to which applicant may put the document once it has been produced into evidence in the course of proceeding - Board identifying no other basis in this case upon which it should restrict use to which document could be put outside of proceedings, or extent of its disclosure in the hearing

MAXI; RE USWA; RE UFCW, LOCAL 175

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1913-97-R; 1944-97-U; 1947-97-R International Brotherhood of Painters and Allied Trades, Local 1904, Applicant v. **Algoma Autobody (Sault) Ltd.**, Responding Party

Discharge - Discharge for Union Activity - Evidence - Practice and Procedure - Union alleging that individual discharged contrary to the Act - Employer intending to assert that discharge was for just cause - Union asking Board to rule that employer estopped from asserting just cause because of decision of Board of Referees under Employment Insurance Act that found that individual's dismissal was not due to his own misconduct - Board not persuaded that the question before Board of Referees the same as the one in the unfair labour practice complaint - Board also noting that employer did not participate in hearing before Board of Referees - Board ruling that doctrine of issue estoppel not applicable in the circumstances

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *C. Flood* for the applicant; *D. Cowling* for the responding party.

DECISION OF THE BOARD; May 21, 1998

1. Board File No. 1913-97-R is an application for certification in the construction industry. Board File No. 1947-97-R is an application for certification brought pursuant to section 7 of the *Labour Relations Act, 1995* (the "Act"). Board File No. 1947-97-U is an unfair labour practice complaint in which the applicant (the "union") includes a request for relief pursuant to section 11 of the Act.

2. A number of hearing days have been set for these applications. The parties are agreed that the responding party (the "employer") will proceed first on all issues. However they also raised a preliminary issue as to whether the employer was estopped from asserting a particular defense. A hearing was held on that issue and this decision relates only to that preliminary issue.

3. In its unfair labour practice complaint the applicant alleges, *inter alia*, that Mr. Dan Bougie was terminated from employment in violation of the Act. The employer defends its decision to terminate Mr. Bougie's employment on the basis that Mr. Bougie failed to follow safety policies and was terminated for cause. It is this defense which the applicant seeks to proscribe. It is the union's position that the employer is estopped from arguing misconduct and/or wilful misconduct in support of its decision to terminate Mr. Bougie's employment. The employer disagrees.

4. The factual assertions made by the applicant in support of its position were not disputed by the employer. Those particulars are reproduced below:

41. Subsequent to the termination of his employment as referred to in paragraph 32, Mr. Dan Bougie made an application for unemployment insurance benefits, but was initially denied on the basis of the Responding Party's assertion that his dismissal was due to his own misconduct.

42. Mr. Bougie appealed this decision and notice of this appeal, and the scheduled hearing before the Board of Referees with respect to the appeal, was provided to the Responding Party. A Board of Referees hearing was held in Sault Ste. Marie on December 15, 1997 and evidence was tendered by Mr. Bougie in support of his claim for benefits. In a unanimous decision, the Board of Referees determined that the dismissal of Mr. Bougie was not due to his own misconduct and his claim for benefits was allowed. No notice of appeal has been filed by the Employer.

5. The parties further agree that the employer was entitled to attend and participate at the hearing before the Board of Referees but did not do so. The employer did provide certain information at the outset as is required by the *Employment Insurance Act*. The time for filing an appeal has now lapsed. The applicant noted that the reason for the employer's failure to attend before the Board of

Referees is not within its knowledge, while the employer asserted that such reason is not relevant. Both agree that should I find the reason to be relevant evidence may be called on that point.

6. The parties essentially agree as to the appropriate test to determine if the doctrine of issue estoppel is applicable. They differ in its application to the circumstances before me. In *Randhawa v. Everest & Jennings Canadian Ltd.*, a decision of the Ontario Court of Justice (General Division) dated June 14, 1996, upheld on appeal to the Divisional Court (endorsement dated November 21, 1997), the Court makes reference to the Court of Appeal's decision in *Rasanen v. Rosemount Instruments Ltd.*, (1994) 17 O.R. (3d) 267. Both decisions consider the same factors to determine whether the doctrine of issue estoppel applies:

1. That the same question has been decided.
2. That the judicial decision which is said to create the estoppel was final; and
3. That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

7. The parties also agree that the Board of Referees' decision is a judicial decision and so meets the second condition outlined above. They differ on the issues of whether the same question has been decided and whether the parties (or privies) were the same. In addition to the caselaw cited above, I was also referred to: *McIntosh Limousine Service Ltd. et al. v. Mr. Y. Zahavy* [1994] OLRD No. 2878, (Board File No. 0755-94-U), August 8, 1994; *OPSEU (Gallina) and Crown in Right of Ontario (Ministry of Correctional Services)*, GSB #1445/89, October 6, 1995; *Minott v. O'Shanter Development Co.* [1997] O.J. No. 214 (Court File No. 92-CQ-20267), January 27, 1997; *Gareau v. Holiday Inns of Canada Ltd.* O.J. No. 614 (Court File No. 94-CQ-59197) Ont. Ct. of Justice (Gen. Div.), February 19, 1997; *Hough v. Brunswick Centres Inc.* [1997] O.J. No. 1387 (Civil No. C37406/96), Ont. Ct. of Justice (Gen. Div.), April 1, 1997; *Cain v. Roluf's Ltd.* [1997] O.J. No. 3239 (Court File No. 8762/96) Ont. Ct. of Justice (Gen. Div.) April 29, 1997; *Honeywell Limited v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 787* [1997] O.L.R.D. No. 2023 (Board File Nos. 3364-96-G et al), June 9, 1997; *Petro Canada v. R. Gregoire et al* [1997] O.E.S.A.D. No. 660 (Board File No. 0126-97-ES), Sept. 4, 1997; *Ryco Alberici* [1997] OLRB Rep. Oct. 926.

8. Turning to the first factor, whether the same question has been decided, the Board of Referees identified the issue before them as whether the complainant lost his employment because of his own misconduct and whether he should be disqualified from receiving regular benefits pursuant to the *Employment Insurance Act*. The question before me is whether Mr. Bougie's employment was terminated for reasons, in whole or in part, having to do with his alleged union activity.

9. In support of broadly defining the question, the union relies on *Rasanen*, *supra*. While the issue in that case was broadly formulated by the Court as "was there any entitlement by the employee to compensation from the employer arising from the terms of his employ?", the Court considerably narrows the scope of the issue in its comments. The Court noted:

The employee's entitlement to termination pay in both proceedings required a determination of whether the employer fundamentally violated a duty arising from the employment relationship giving rise to liability and compensation. *The process under the Employment Standards Act ended with a dismissal of the employee's claim because of findings that reasonable alternative employment was available and that the employer acted in good faith.* The question of whether there was entitlement to termination pay was accordingly answered in the negative. These are the same

questions that were to be answered in the appellant's wrongful dismissal proceeding. *The questions are not only the same, they are fundamental to the decision.*

Having had the questions answered in the *Employment Standards Act* claim the appellant had conclusive answers for any subsequent litigation. Even if one accepts the argument that the referee did not have to decide whether there was a fundamental breach, he *did have to decide whether reasonable alternate employment was offered, a crucial question in the wrongful dismissal action. In deciding that there was a reasonable alternative, the referee decided the central question of whether or not entitlement existed in the wrongful dismissal action.*

[emphasis added]

10. The issue before the Board of Referees in this case was whether the claimant was terminated because of his own misconduct. That question focuses on the claimant's conduct not the employer's motive. A finding of no misconduct does not, *ipso facto*, result in a finding of improper motive. Nor is a finding on the issue of misconduct "fundamental" to the issue of the unfair labour practice. For example, the applicant acknowledged that the standard applied by the jurisprudence under the *Employment Insurance Act* was "wilful" misconduct, a more egregious conduct. There may be misconduct that does not result in the loss of employment insurance benefits but for which employment is terminated without improper motive. Similarly, had the answer to the question of the existence of misconduct been "yes" and the employer sought to rely on the finding in an unfair labour practice complaint, a union could rightly argue that the finding was not the same question as before the Board, for, even in the face of misconduct, an employer may still be found to have violated the Act. While the applicant here seeks only to limit the employer's available defence, I am not persuaded that it is appropriate to place such seemingly artificial walls around the issue of misconduct in circumstances where I am dealing with an allegation of an unfair labour practice.

11. Contrast this case to the Board's decision in *McIntosh, supra* where the Board found an issue estoppel in circumstances where an arbitration had been held in which the individual grievor was found to have been a party and where not only the reasons for termination were put in issue but the employer's motivation as well, pursuant to a collective agreement provision which prohibited discrimination on the basis of union activity and/or rights under the Human Rights Code.

12. I am thus not persuaded that the question which has been decided by the Board of Referees is the same as that before me and I would not apply the doctrine of issue estoppel on that ground.

13. However even if I am incorrect in that conclusion I am also not persuaded that the parties or their privies were the same in the proceedings before the Board of Referees as in these proceedings before the Board. The employer did not participate at the Board of Referees hearing. The union relies on the fact that the employer could have participated as a full party and chose not to and so is bound by that decision.

14. In *Minott, supra* the Court, in a wrongful dismissal action, found that an issue estoppel was not established where the employer had not participated in the hearing before the Board of Referees determining the plaintiff's entitlement to employment insurance benefits. It distinguished *Rasanen* on the basis that in *Rasanen*, the employee opposing the application of the doctrine of issue estoppel had in fact participated and been represented in the hearing before the Employment Standards Referee. Similarly, in *Hough, supra* the Court in applying the doctrine, found that the plaintiff was a party to the earlier proceedings in circumstances where he had participated in the earlier unemployment insurance process, having filed a claim, appealing a finding against him but then withdrawing his appeal shortly before the hearing was to occur. The Court in *Minott* also relied on the decision in *Bowen v. Ritchie Bros.*, referred to in *Hough, supra*, wherein the Court concluded that where an employer was not

present, did not call evidence, and did not testify in an unemployment insurance claim, the parties to the judicial decision were not the same as in the subsequent wrongful dismissal action.

15. In *Rasanen supra* the plaintiff in the wrongful dismissal action had been successful before the Board of Referees in obtaining unemployment insurance benefits. The employer had appealed the Board of Referees' decision, participated actively in that appeal, and had lost the appeal. On the issue of whether the parties were the same, the Court relied on the fact that the employer had exercised its right to become a party in the unemployment insurance proceedings and actively opposed the employee's claim. In applying the doctrine the Court stated:

14. I note finally that there may well be situations where one would hesitate to apply the doctrine of issue estoppel where a party participated in an administrative hearing having insignificant consequences and the result of that hearing was then raised later in a suit which had enormous consequences. ... The employer consciously chose to challenge the right of the employee to secure Unemployment Insurance benefits upon the same ground that is now raised in this suit. The employer forced a quasi judicial hearing on that point, presented its case and I can see no reason not to hold the employer bound by virtue of having participated in that hearing. The policies identified by Abella J. A. in *Rasanen*, namely the need to have an end to litigation and to avoid undue harassment of one party by another, are fully met in the circumstances. It follows that because of the Board of Referee's decision the defendant is precluded from raising the defence of either voluntary quitting or cause.

16. These references to caution seem appropriate in my view. Although judicial, proceedings before the Employment Insurance Commission and Board of Referees are of significantly less consequence than for example, these proceedings before the Board. I am not persuaded that it makes good labour relations sense to require an employer to always actively participate in proceedings such as an employment insurance hearing out of concern that it be held to those results. This is particularly so when a union has no independent right of standing before the Board of Referees and can chose not to participate on behalf of a claimant and not be bound by the result. This concern is met by the distinction drawn in the cases of *Minott* and *Bowen*. If the employer (or union) participates as a party or privy, the third condition may be met. When there is no such participation, the condition is not met. This does not provide a second opportunity for an employer who decides not to participate. Should the result be in the employer's favour it would not be entitled to assert that result having not participated in the process.

17. In the case before me, the employer did no more than provide the information required of it by legislation. It did not seek to challenge or participate in the proceeding before the Board of Referees and although entitled to be a party, did not participate. On that basis the employer cannot be found to have been a party or privy to those prior proceedings.

18. In the result I am not persuaded that the doctrine of issue estoppel is applicable in the circumstances. Therefore the employer, on the hearing of the merits of these applications, may rely on a defence that Mr. Bougie was terminated by reason of his own misconduct.

0346-98-R Bruce Archibald, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 18, Responding Party

Charter of Rights - Constitutional Law - Construction Industry - Termination - Injured employee in receipt of workers' compensation benefits and therefore not at work applying to terminate union's construction industry bargaining rights - Applicant challenging requirement that individual be working in bargaining unit on date of application in order to bring a termination application in the construction industry - Board rejecting submission that that requirement

discriminates against him on grounds of disability contrary to Charter of Rights and Human Rights Code - Application dismissed

BEFORE: *M. A. Nairn*, Vice-Chair.

DECISION OF THE BOARD; May 18, 1998

1. This is an application to terminate bargaining rights in the construction industry. The application is brought in respect of bargaining rights in the industrial, commercial, and institutional sector. The parties agree that the applicant was not at work in the bargaining unit on the date of application and that he was in receipt of Workers' Compensation benefits. The applicant asserts that he is the only employee in the bargaining unit.

2. The applicant has made submissions as to why he ought to be entitled to bring the application and be entitled to vote. The applicant acknowledges that the Board has previously ruled that in order to bring an application to terminate bargaining rights or to vote in such an application the person must have been employed performing work in the bargaining unit on the date of application. In this case the applicant asserts that such a finding deprives him of rights available to other workers on the basis of his injury and is discriminatory and contrary to the Human Rights Code and the charter. With respect, I disagree.

3. The Board has held that in order to bring an application terminating bargaining rights in the ICI sector of the construction industry or to be allowed to vote in such an application the person must be employed performing work in the bargaining unit on the date of application. The applicant does not dispute this. (See *Fred Jantz Masonry Construction Company Limited* [1986] OLRB Rep. Aug. 1083 and the cases cited therein at paragraph 14 and the discussion in *Ken Anderson Electric Inc.* [1996] OLRB Rep. Sept./Oct. 846 at paras. 11-35). Contrary to the applicant's assertion that he is being deprived of a right because of his disability, the reason for his absence is irrelevant. In fact, he is seeking a greater right than able-bodied persons who are absent from work on the application date for other reasons. Nor can it be assumed that absent the injury the applicant would be performing work in the bargaining unit on the date of application. That is mere speculation.

4. I place no weight on any information the applicant asserts he received from someone at the Board. The Board is an independent tribunal and cannot and does not provide legal advice to parties who may appear before it.

5. I am not persuaded that there is any basis to depart from the Board's earlier decisions. Having regard to the fact that the applicant was not at work in the bargaining unit on the date of application and the fact that this is an application to terminate bargaining rights in the ICI sector of the construction industry, I find that the applicant was not entitled to bring the application and this application is hereby dismissed.

4976-97-R Canadian Union of Public Employees, Applicant v. **Brock University**, Responding Party v. Group of Employees, Objectors

Certification - Representation Vote - Following representation vote in certification application, certain employees raising concerns that some objecting employees had not had adequate notice of the vote, had to wait in line to vote, and had been unable to cast ballot before having to leave to write an exam, that the union had not spoken to them about the organizing

drive, or that no one had contacted them directly about vote arrangements - Board satisfied that allegations, even if true, would not change result of application - Certificate issuing

BEFORE: *Gail Misra*, Vice-Chair.

DECISION OF THE BOARD; May 5, 1998

1. This is an application for certification in which a hearing was scheduled to commence on May 4, 1998. However, prior to the commencement of the hearing the parties resolved all matters in dispute.
2. The Board received four statements of desire to make representations within the time fixed by the Board following the taking of the representation vote pursuant to the Board's direction of April 1, 1998. Only one of the individuals who had filed a statement attended at the Board on the hearing date. That individual, following the Minutes of Settlement being reached between the applicant and responding party indicated she was waiving her right to speak to the Board. The representations received raised concerns that some of the objecting employees had not had adequate notice of the vote, had to wait in line to vote, and had been unable to cast a ballot before having to leave to write an exam, that the union had not spoken to them about the organizing drive, or that no one had contacted them directly about the vote arrangements.
3. There is no requirement for either the applicant or the responding party to contact each and every employee to alert them to either the possibility of a certification application or that a vote has been scheduled. That is the purpose served by the postings in multiple locations throughout the University. It is unfortunate that some individuals did not attend at the University during the period between the posting of notices and the day of the vote, but that is not sufficient reason for the Board to hold a hearing for that purpose.
4. The *Labour Relations Act, 1995* mandates the Board to hold representation votes within five days, whenever it is possible to do so. In this case, at the request of Brock University, the Board delayed the holding of the vote to a date of the University's choice. By 3:00 p.m. on April 3, 1998 thirty six copies of the certification application, the Board's decision directing the vote, and Notice of Vote had been posted at various sites throughout the University by the employer. The employees therefore had five days notice of when the vote would be held, more time than is normally given to employees in certification applications. The Board is satisfied that employees received adequate notice of this application and vote.
5. Having considered all of the representations, the Board is satisfied that the objecting employees have raised no allegations which, even if proved true, would change the result of the application.
6. Having regard to the agreement of the parties, the Board further finds that:

all employees of Brock University employed as Course Coordinators, Instructors, Seminar Leaders, Teaching Assistants, Demonstrators, and Marker/Graders, save and except persons employed as Instructors, Program Co-Ordinators and On-Site Facilitators in the Faculty of Education, and all other persons employed in an on-going capacity whose positions are primarily clerical, technical, administrative or professional and who may teach, coordinate, advise or demonstrate as an integral part of that position and persons for whom a trade union held bargaining rights on April 1, 1998,

constitute a unit of employees of the responding party appropriate for collective bargaining.

Clarity Note

It is understood and agreed that the bargaining unit description/scope clause does not include employees who are otherwise regularly employed by Brock University in a managerial capacity or in a confidential capacity in matters relating to labour relations.

7. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.
 8. A certificate will issue to the applicant.
 9. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.
 10. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted for 30 days.
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4352-97-FC Ontario Nurses' Association, Applicant v. Comcare (Canada) Limited, Responding Party

First Contract Arbitration - Employer taking position in bargaining that "elect to work" system of work assignment was essential for financial reasons - Employer establishing no evidentiary basis for that position before the Board - Board determining that employer's position an uncompromising one taken without reasonable justification - Board directing that first collective agreement be settled by arbitration under section 43(2)(b) of the Act

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *David Nicholson, Shalom Schachter, Karen Leeder, Eleanor Holroyd, Marilyn Dee, Lin James and Cynthia Melo* for the applicant; *M. Patrick Moran, Glenn Christie, John Mackenzie, Marg McAlister and Norma Johnston* for the responding party.

DECISION OF THE BOARD; May 15, 1998

I. Introduction

1. This is an application brought by the Ontario Nurses' Association (hereinafter "ONA" or "the union") pursuant to section 43 of the *Labour Relations Act, 1995* (hereinafter "the Act"). The union requests that the Board direct that a first collective agreement be settled by way of arbitration. The application was filed by the union on February 13, 1998. A response to the application was filed by Comcare (Canada) Limited (hereinafter "Comcare" or "the employer") on February 25, 1998. This Vice-Chair was authorized, by the Alternate Chair, to sit alone as a panel of the Board by way of memorandum dated March 2, 1998. The hearing of this proceeding commenced on that same day, and was completed on March 6, 1998.

2. On March 9, 1998, the Board issued the following endorsement:

This is an application brought to the Board pursuant to section 43 of the *Labour Relations Act, 1995*. I have considered the evidence and argument of the parties. In the circumstances, I am satisfied that the process of collective bargaining has been unsuccessful because of the uncompromising nature of a bargaining position adopted by the responding party without reasonable justification. I therefore direct the settlement of a first collective agreement by arbitration in accordance with section 43(2) of the Act. Full reasons will follow.

These are the reasons for that decision.

II. The Facts

(a) The Broader Factual Context

3. The union pleaded, and the Board heard evidence of, certain facts which were asserted by the union to be relevant to the context of this application. The employer did not object to the admission of this evidence, which was called primarily through Mr. Shalom Schachter, a Coordinator employed by the union. Ms. Karen Leeder, an Employment Relations Officer with the union, and the lead negotiator for the union in collective bargaining, was also cross-examined regarding some of the assertions made by ONA.

4. The current government in Ontario has determined to shift the delivery of health care from acute care institutions to the community through home care programs. The downsizing of the hospital sector has the consequence of moving work from a highly unionized environment to one which is lightly unionized with a larger private sector component. The union disagrees with this overall strategy of the government, and prefers an integrated delivery system for all health care in Ontario, and one which attracts the five principles identified by the *Canada Health Act*. A by-product of this system would be the maintenance of the bargaining rights currently held by ONA as work moved throughout the integrated network.

5. Currently, the structure for the delivery of community care services reflects a system which has eliminated barriers to privatization. There are no statutory successor rights provisions to ensure that successful contractors for the delivery of nursing services are required to inherit any bargaining rights previously obtained by ONA (or any other trade union). Contracts for the delivery of nursing services are obtained by way of bidding on a tender. The lack of such a successor rights provision permits successful bidders to escape the rights reflected by existing collective agreements when work is obtained from the public sector, and to make greater profits, and therefore encourages more private sector bidders to enter the market.

6. Community Care Access Centres (hereinafter referred to as "CCAC's") have been created with a mandate to coordinate access to services in the community. As noted above, it is the role of local CCAC's to secure companies to deliver health services through the mechanism of a tendering system. The work is to be contracted out by the CCAC in its entirety. In fact, the government has directed any CCAC that still delivers these services through direct employees to lay off those employees within three years of the establishment of the CCAC. It would appear that recently the government has accelerated its desire to terminate the provision of care through direct employees of the CCAC's. In awarding work, CCAC's are mandated to consider both cost and quality of care, but there is some question as to whether they truly consider the latter factor.

7. It is ONA's view that the movement to delivery of health care services by way of the CCAC will lead to turmoil in labour relations. Employers will inevitably desire to keep their labour costs down in order to remain competitive with new entrants to the market, which will inevitably lead to the "low balling" of bids to obtain work. The result of this will be the loss of tenders by existing contractors, and

loss of employment and collective bargaining gains. There will always be a threat that unionization or serious collective bargaining will result in job loss.

8. In Mr. Schachter's view, ONA's experience with Comcare in Kingston is evidence that this is happening. He stated that the CCAC system creates a "treadmill", in that once a trade union negotiates a decent collective agreement with a health care provider, it almost certainly will create a hardship for that employer to become a successful bidder in the next round of bidding. In light of the lack of a statutory successor rights provision, the next successful bidder for the work need not apply the previous contractor's collective agreement, and the process of achieving gains for employees must commence once again, until employees come to the conclusion that it is just not worth the effort. However, without collective bargaining, compensation for nurses will ratchet downwards, creating low paid and insecure employment, until the labour market becomes so tight that it stabilizes the level paid to workers.

9. The testimony of the union established that existing "not for profit" employers which deliver health care services are pressing for rollbacks at the bargaining table, and are concerned about being pushed out of business. In the community care sector, the largest "not for profit" employer is the Victorian Order of Nurses (hereinafter "the V.O.N."). The V.O.N. is concerned about the lack of a "level playing field", and is pressing ONA for rollbacks in negotiations. The V.O.N. has lost contracts (including one to Comcare in Waterloo), and is concerned that the CCAC system will put it out of business. In the long run, the union is concerned that the effect of the CCAC system will be to establish a small number of large, multinational "for profit" companies controlling the delivery of these health care services in Ontario.

10. All of this, in the union's view, will result in a lower level of quality of health care in Ontario. Money which could otherwise be spent in the delivery of providing health services will be consumed in preparing proposals in response to the various Request for Proposals issued by local CCAC's, and in the profits earned by successful bidders. The union foresees the day when the staff hired to provide health care services in Ontario have few skills, are paid little compensation, suffer from low morale and move between jobs regularly. The quality of care received by those in the community will not be equal to that which can be received in a hospital.

11. In the above context, the union considers the bargaining with Comcare to be critical to future bargaining in the home care field. It is concerned that all of the gains made in bargaining will be lost, having come "full circle" from the position experienced in prior decades. Furthermore, the union is concerned that the minimum standards as reflected by the *Employment Standards Act* be real for employees in the community care sector. It was Mr. Schachter's testimony that it is generally acknowledged that the protections of the *Employment Standards Act* are most effectively enforced if the workplace is unionized. It was Mr. Schachter's testimony that the negotiations with Comcare reflected a desire by Comcare to provide a disincentive for its employees to unionize. By attempting to foist an "elect to work" system of assignment of work onto its employees (the details of which will be set out below), the employer was signalling that it would not modify such systems elsewhere, in its other work locations.

12. Ms. Leeder was of the view that the Comcare negotiations could be viewed in a broader context because the result of a reasonable collective agreement in these negotiations would be that other persons would join the union, or another trade union. She noted that ONA's goal, in the long run, is to have all nurses treated equally with regard to wages and benefits, irrespective of the sector - community care, hospital, or homes - worked in. Ms. Leeder conceded that it is very likely that higher rates of pay would not permit Comcare to attract work, and that if Comcare could not stay competitive in the rates of pay that it pays nurses, it "could very well be" that it would secure no work. However,

Ms. Leeder suggested that the solution to such a problem would be for Comcare to take a smaller amount of profit.

13. With this broader context established, the parties also called evidence regarding the facts specific to the negotiations which have occurred at Comcare's Kingston location.

(b) The Facts Specific to the Parties

14. Although there were some differences in the evidence adduced by the parties, there was, to a large extent, consensus on the relevant facts of this proceeding. The union represents approximately 43,000 Registered Nurses and Health Professionals in Ontario. The employer is a "for profit" provider of health care services that operates in various provinces throughout Canada, including Ontario. In Ontario, there are numerous locations serviced by Comcare, including Kingston, which is the focus of this particular proceeding.

15. On November 27, 1996, the union was certified as the bargaining agent for "all employees of Comcare in the City of Kingston employed as Registered Nurses and Registered Practical Nurses, save and except managers and persons above the rank of manager, and save and except the positions of Quality Management Coordinator, Office Administrator, Team Leader and Scheduling Leader". This bargaining unit encompasses approximately 84 employees of Comcare.

16. By way of letter dated December 17, 1996, the union provided the employer with written notice of its desire to bargain with a view to making a collective agreement. Some time later, negotiations commenced, and it would appear that there were nine negotiation, conciliation or mediation meetings between the parties through to mid-September, 1997. At that point, negotiations not having progressed to the satisfaction of the union, ONA brought an application to this Board for a declaration that a first collective agreement be settled by way of arbitration (Board File 2280-97-FC).

17. The Board made certain findings of fact in that proceeding. Ms. Leeder, before this panel of the Board, stated that she still agreed with certain facts found in the previous application, which facts read as follows:

With regards to the elect to work system, Ms. Leeder was a candid witness who clearly stated that it was ONA's objective to negotiate what she referred to as the "standard language" in regards to the definition of a full-time and part-time nurse. In her view, such language had been negotiated with the V.O.N. and others in a similar business. She was of the view that employees at Comcare should not be treated any differently than other nurses ONA represents. She was aware of no other ONA contract in which such definition had not been agreed to. She acknowledged that ONA's system was a charge [sic] from the existing model at Comcare and would have a number of inherent costs. She further agreed that Comcare had made proposals addressing one of the concerns raised at negotiations - namely that senior nurses often got less work than junior nurses. She agreed that there was currently no obligation to give preference to senior employees.

18. On October 17, 1997, the Board dismissed the union's initial first contract application. Distilled to its essence, the Board concluded that the situation as it then stood was not of such a nature that the Board ought to direct that a first collective agreement be settled by way of arbitration. The evidence before the Board, at that time, established that the employer's positions on the "elect to work" issue and its monetary proposal were both reasonable.

19. The parties had received, from the Ministry of Labour, notice in writing dated August 29, 1997 that the Ministry had decided not to appoint a Board of Conciliation in reference to this dispute. After the mediation session of September 11, 1997, the parties had executed a Letter of Understanding to the effect that no strike or lock-out would occur until the union's initial first contract arbitration application was decided by the Board. Accordingly, upon receipt of the decision of the Board dated

October 17, 1997, the union and the employer were in the position that one of them could initiate a strike or lock-out, as the case may be. In fact, the union and the bargaining unit employees of the employer commenced a legal strike on November 7, 1997, and that strike continued to the date of the hearings in this proceeding.

20. The next event which is salient to this particular application occurred in late November, 1997. The lead negotiator on behalf of ONA in these negotiations, Ms. Leeder, sought the input of nurses in the bargaining unit regarding the difficulties they had encountered with the "elect to work" system which appears to have been in effect at Comcare. I use the word "appears" here because it is evident, having heard the evidence of three witnesses during this proceeding, that there is no real consensus between the parties on the proper label to be attributed to the system of assigning work to nurses employed by Comcare.

21. It is appropriate, at this point, to outline the positions that the parties have staked out respecting the "elect to work" system. It would appear from the evidence adduced before me that, from at least July, 1995, the employer has utilized a system of assigning work which results in the creation of a "visiting nurse schedule" each week, which schedule speaks to the assignment of work over the following four calendar weeks. One page of such a schedule was filed as an exhibit with the Board. It identifies certain individuals by name and indicates, horizontally across the page, the availability of that person for work on any particular day. How one construes this document, and the system that underlies it, is, in part at least, at the core of the dispute between the parties.

22. The employer asserts that it employs nurses only on a "casual" basis. Each nurse employed by Comcare in Kingston has executed a document to that effect. It was the testimony of Ms. Norma Johnston, the employer's Regional Manager, that each nurse employed by Comcare makes the employer aware of her "general availability" at the time of hire, and that this "general availability" is taken into account by the employer in assigning work, subject to any "specific availability" of which that particular nurse may make Comcare aware. That is, over a period of time, a nurse may indicate, for example, a "general availability" for work of Monday to Friday only, and Comcare will fill in the boxes on the visiting nurse schedule with that expectation in mind. If that nurse is not going to be available on any particular day or days, she will inform the employer and that "specific availability" will be engrafted upon the expectation of the employer, as reflected by the visiting nurse schedule.

23. Consistent with this approach, the employer asserts that the visiting nurse schedule is, in reality, a "list of availability" and not a true "schedule". The "specific availability" of a nurse is typically communicated to the employer by way of Projected Time Logs and Coverage Sheets which are delivered by nurses to Comcare on the Thursday or Friday of each week, and which speak to their projected work for the next calendar week. Comcare can tell, from these documents, the "specific availability" of any particular nurse, and fills in any gaps in nursing care coverage by calling other nurses (who, themselves, have provided Comcare with both their "general" and "specific" availability) to ensure that all of its clients are provided with the required nursing care.

24. The union, on the other hand, asserts that the visiting nurse schedule is exactly what it says it is, a schedule, and that it reflects a world where there are three different types of employees; those who work, month in and month out, five days a week (called "full time employees"); those who work less than five days per week, but who work regularly (called "part-time employees"); and those who work on a sporadic, as needed basis (called "casual employees"). Accordingly, it is the union's view that the employer's characterization of all of its employees as "casual" is wrong, and that ONA's proposed categorization in the collective agreement of employees in the manner described above is appropriate, and ought to be accepted by the employer. Not surprisingly, the employer disagrees with the latter proposal made by the union. The level of disagreement on this issue was palpable at the

hearing, and resulted in what can only be described as a bizarre exchange between counsel for the union and Ms. Johnston during the latter's cross-examination as they continually recast each other's characterization of the visiting nurse schedule to accord with his or her own.

25. This is where the "elect to work" system comes into play. The employer is of the view that this system is "the defining characteristic" of Comcare, and is unwilling to structure its assignment of work in the manner urged by the union - i.e. through a formal schedule. The employer resists this approach for various reasons, which I will outline below. At this point, it is only important to note that, whether the parties do or do not agree on whether the employer's system is an "elect to work" system, there can be no doubt that the employer's system of assigning work is founded upon the employer having a large, extremely flexible work force which can be assigned work as required.

26. Returning to late November, 1997, Ms. Leeder determined that it would make some sense to sit down with the employer and discuss the concerns that the ONA members at Comcare had regarding the "elect to work" system. Accordingly, she canvassed her members and reduced to writing the comments of seventeen nurses. These comments were forwarded to the employer on November 26, 1997. Two days later, Ms. Leeder met with Ms. Johnston and Ms. Marg McAlister, the employer's Vice-President of Operations, to discuss the comments of the nurses employed by Comcare in Kingston. A full discussion occurred regarding these comments. It would also appear that there was a discussion at that meeting regarding the concept of seniority. It was the union's view that if a nurse lost a patient, then she ought to be entitled to obtain another from a less senior nurse as a replacement. The employer did not alter its opinion on the merits of the "elect to work" system at that time.

27. At the conclusion of that same meeting, Ms. McAlister advised Ms. Leeder that Comcare had been unsuccessful in bidding for the 1998 contract for delivery of shift and visiting nursing services from the Kingston, Frontenac, Lennox and Addington CCAC. As it turned out, this development has been of some significance in shaping the positions of the parties. I should note here that, during argument, counsel for the union submitted that there had been no evidence called to establish the failure of Comcare to successfully bid for the 1998 Kingston and area CCAC contract, and that there was, therefore, no evidence before the Board of such a loss. I have carefully reviewed my notes of the hearing and reject that submission. In fact, it was Ms. Leeder who, in cross examination, first identified the successful bidder for the contract (in her words, "an outfit called All-Care"). Both parties conducted this proceeding on this basis. There can be no doubt that Comcare's volume of work has shrunk as a result of its failure to successfully bid for this work.

28. The next event of significance was a meeting at the Board in early December, 1997. On November 18, 1997, the union had filed an unfair labour practice complaint with the Board (Board file 3103-97-U), alleging that the employer had violated, amongst other things, sections 17, 70, 72, 76 and 78 of the Act. (This application was, in fact, heard by the Board and dismissed on February 6, 1998. Reasons for the dismissal of the application issued on April 17, 1998.) The parties met at the Board with a Labour Relations Officer in early December in order to attempt settlement of the unfair labour practice complaint. In attendance for the employer was Ms. McAlister and Mr. Glenn Christie, a solicitor who was the employer's chief spokesperson during the course of negotiations. In attendance for the union was Ms. Leeder, Mr. Shalom Schachter, Mr. Jacek Janczur, and Ms. Marilyn Dee, a nurse in the bargaining unit who is also a Vice-President of the local union.

29. At that meeting, unsuccessful attempts were made to settle the broader collective bargaining issues in dispute between the parties. Towards the end of the meeting, the parties met face-to-face, because Mr. Schachter wished to convey to the employer the message that the union was not going to restrict the economic sanctions it was then inflicting on Comcare to the Kingston area, but rather would inflict them across the province. Having regard to the evidence of Ms. Leeder and Mr. Schachter, it

would appear, on balance, that Mr. Schachter also stated in the course of delivering that message that ONA did not see the Kingston strike as an isolated bargaining dispute, and that ONA could not accept a settlement in Kingston which would undermine collective bargaining outcomes in other areas of the province.

30. The next event of significance was a negotiation session under the auspices of a Ministry of Labour mediator which occurred in Kingston on January 28, 1998. It is the events and the outcome of this negotiation session which anchor the union's request for a direction that a first contract be settled by way of arbitration. In attendance on behalf of the employer were Mr. Christie, Ms. McAlister, Ms. Johnston and Mr. John McKenzie, the employer's Vice-President of Human Resources. In attendance on behalf of the union were Ms. Leeder, Mr. Schachter and, likely, other members of the union's bargaining team, though no evidence was called by the union at the hearing to identify those other members of the bargaining team present at the time.

31. Ms. Leeder remained in her role as the union's chief spokesperson. At the outset of the meeting, the parties did not meet face-to-face, but permitted the mediator to move between their respective rooms. Ultimately, the union requested that the parties meet face-to-face. When they did, Ms. Leeder spent approximately 10 minutes talking about scheduling and the "elect to work" model. Ms. Leeder asked the employer to advise the union of the reasons why ONA's proposed language defining the categories of nurses and hours of work could not fit into the employer's "elect to work" model. The parties thereupon went into their respective rooms and caucused.

32. Approximately one hour later, the parties met again to discuss the issues previously raised by Ms. Leeder. Mr. Christie went through a lengthy explanation of the employer's model. He raised concerns regarding the union's proposed model with respect to the notion of "continuity" - that is, the concept that a patient ought to be entitled, to the greatest extent, to continuity of care through one caregiver. Mr. Christie stated that Comcare's model satisfied the continuity concept better than ONA's model for five reasons. First, that if a nurse accepted an assignment, then the "elect to work" system made it hers. In that regard, the employer desired employees to work where and when they wanted, and felt that if nurses volunteered for an assignment, then they would see a case through to the end. The right to reject a case also would lead to greater continuity. Furthermore, the employer noted that nurses, as professionals, would ensure continuity in an "elect to work" model. As well, Mr. Christie communicated the employer's experience that once accepted, most clients did not, in fact, move from nurse to nurse. Mr. Christie, finally, noted that it was the employer's experience that once a general pattern of availability was established by a nurse, she would typically follow that pattern. All of this, submitted the employer, suggested that its "elect to work" model had built into it a greater prospect of continuity of care.

33. Mr. Christie next addressed the cost issue. In his view, a move away from the "elect to work" model would lead to extra costs. This is particularly so as it relates to the payment of statutory holiday pay. He noted that the system was attractive to many nurses. He submitted to the union that ONA's model was an institutional one, not suited to the concept of community care. In particular, Mr. Christie focused on the fact that the ONA proposal would require the employer to "micromanage" employees, to ensure that their days were filled with appointments. Mr. Schachter took from this that the union's proposed system - with its "per hour" payment structure rather than a "per visit" compensation structure which was then in use by the employer - was seen by the employer as putting it at risk for the cost of a nurse's "down time". Mr. Christie also addressed the concerns of the employer respecting the absence of "daily tours", which concept was also a part of the union's proposal. He also noted that there was no need for certain premiums which are typically found in ONA agreements, and in the draft agreement proposed by the union, because employee freedom to choose to work is inherent in Comcare's proposal.

34. After Mr. Christie's presentation, the parties once again caucused. Upon resuming face-to-face negotiations, Mr. Schachter responded on behalf of the union. Mr. Schachter stated that the employee desirability/motivational concerns of the employer could be met within the union's model, because it reflected the concepts of full-time, part-time, and casual nurses, which concepts themselves have "built in" degrees of motivation and desire to work a certain amount of hours. He raised the union's concerns about the employer's "elect to work" model and continuity of care, observing that a model that permits nurses to freely become unavailable may result in an occasional inability to service patients under the employer's care. Once again, the parties broke after this discussion.

35. Once the parties resumed negotiations at the same table, Mr. Christie indicated that the employer felt that it had a sufficiently large staff to ensure that continuity could be maintained. There was some discussion respecting the manner of paying nurses (i.e. per hour or per visit). Mr. Christie then observed that the union's counterproposal did not address the employer's concern regarding the element of choice for nurses, and specifically the ability of a nurse to choose the type of client or the type of work she desired to perform. After a short break, the union responded that it would modify its proposal to include a mechanism for nurses to indicate the kind of cases that they want to take on. After a further break, the employer returned and simply advised the union that it preferred its system, without any discussion as to how it was that the union had not accommodated the employer's interests.

36. There is no dispute that, from the outset of the negotiations, the employer has taken the position that it cannot increase the monetary compensation paid to the nurses in the bargaining unit. It would appear that an early proposal that was perceived by the union as being in the nature of a concession was revised by the employer to reflect the maintenance of the status quo. In essence, the employer has steadfastly maintained that it cannot "increase the size of the economic pie" because of the pressures on it to remain competitive in the bidding process in the Kingston area.

37. With respect to the employer's concerns over the cost of the union's proposals, and its general inability to "increase the size of the economic pie", the union's bargaining committee made two separate concessions at the January 28, 1998 meeting in order to create some "momentum" towards reaching a collective agreement. First, it dropped some proposed language which would have required the employer to pay holiday pay to part-time employees for worked holidays. Secondly, it revised some proposed language which would have permitted a nurse full credit on the wage grid (and therefore accelerated movement on the grid) for nursing experience obtained prior to employment with Comcare. Neither of these proposals caused the employer to respond with any monetary concessions of its own.

38. Further to the issue of cost, at that time Mr. Schachter questioned the employer whether it was willing to "open its books" in order to prove to the union that it could not afford to agree to some of the union's demands because of the cost involved. (At the hearing, Mr. Schachter acknowledged that the union's proposals as at January 28, 1998 were more costly than the structure then in place in Kingston.) There was some disagreement by the parties at the hearing regarding the extent to which Mr. Schachter described what information it was that he was requesting of the employer. Having regard to the evidence, I am satisfied that Mr. Schachter requested more from the employer than merely that it "open its books". I am satisfied that Mr. Schachter indicated to the employer that the union would need full access to the data on cost, and not just information regarding the revenue it obtained per visit. I am also satisfied that he explained why he needed that information. Ms. Johnston did not dispute in her testimony that the employer was aware of the general nature of the union's request. The parties once again broke, and the union was advised, through the mediator, that the employer would respond to this request within seven days. At that point, the day was completed, and the parties departed.

39. One week later, Ms. McAlister forwarded one page of correspondence to Ms. Leeder by way of facsimile. The letter notes that Comcare's bid for the 1998 Kingston and area CCAC nursing

services tender was unsuccessful, having been underbid by “several competitors”. It identifies the per visit revenue rate and identifies a number of elements that make up the costs of providing nursing services. However, the letter clearly does not “open Comcare’s books” for the union. Nor does it directly answer the question posed by Mr. Schachter one week earlier. Shortly after receipt of that correspondence, the union filed this application.

40. As at the time of the hearing of this application, the strike in Kingston continued. Ms. Leeder agreed with the employer that not all of the bargaining unit employees have taken part in the strike. Of the 84 persons in the bargaining unit (this number being proffered by the union in its application), 51 employees have either remained at or returned to work during the course of the strike.

III. Decision

41. The provisions of the Act applicable to this particular proceeding are sections 43(1) and (2), which read as follows:

(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

42. The principles which apply to the question before the Board are not in dispute. Section 43 of the Act is not intended to displace free collective bargaining between a trade union and an employer as the primary means of achieving the terms and conditions of employment applicable to employees in a bargaining unit. What section 43 does do is signify the Legislature’s determination that first collective agreements can be, on occasion, particularly difficult to achieve, and that, in certain limited circumstances, there ought to be available a mechanism for the parties to a bargaining relationship to achieve such a collective agreement by way of third-party arbitration. Although it is, by now, trite to note that this provision of the Act ought to be liberally interpreted, there is no doubt that, even with that observation in mind, it cannot be that the Legislature envisioned that every situation which reflects a failure to reach a collective agreement ought to be settled pursuant to section 43 of the Act. The previous application between these parties establishes that conclusion.

43. The Act provides, in essence, for a two stage process to be undertaken by the Board. First, it is incumbent upon the Board to determine whether it appears, from the circumstances of the case before it, that the process of collective bargaining has been unsuccessful. Assuming that the answer to that question is in the affirmative, the Board must next consider whether the unsuccessful nature of the collective bargaining process is caused by any of the reasons identified in subparagraphs (a) through (d) of section 43(2) of the Act.

44. Does it appear that “the process of collective bargaining” has been unsuccessful in this case? Counsel for the union submitted, during the course of argument, that it does, and I am of the view that he is correct.

45. There is no particular hallmark which identifies unsuccessful collective bargaining from that which is still capable of success. Obviously, it is not sufficient to note only that a collective agreement has not been achieved at the bargaining table, for the Act does not assume that a collective agreement need necessarily result from any bargaining relationship. However, the Board has, in its jurisprudence, identified certain factors which may be considered in any one case. As a general observation, the Board noted in the seminal case of *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005, that the Board must review “the totality of the process” and be cautious “not to examine the complaint in a factual vacuum”.

46. One consideration to be taken into account is the number of bargaining sessions held by the parties (see, for example, *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441). Here, there have been eleven. Of those eleven, four have been held under the auspices of a conciliator, and another three have been held with the assistance of a mediator. Although there is no “magic number” of meetings which the parties need to have attended in order to establish a lack of success in collective bargaining, a consideration of the number of meetings to date, the amount of progress made at those meetings, and the degree of Ministry of Labour involvement in those meetings, suggest to the Board that the bargaining process has not been a successful one. At the time of the application, there were literally dozens of outstanding issues between the parties.

47. There are other “badges” of a failure to succeed which are apparent on the evidence before me. Any significant bargaining activity between the parties, which commenced in the spring of 1997, effectively ended in or about September, 1997, at or around the date of the first application made to the Board by the union for a direction that a first contract be settled by way of arbitration. Since then, the parties have met only three times, and only twice specifically for the purposes of collective bargaining. The process has essentially gone nowhere. The totality of movement in that time frame, which encompasses just slightly less than six months, is the union’s two concessions made during the bargaining session held on January 28, 1998. Furthermore, a strike which was, at the time of the hearing, entering its fifth month, has resulted from the labour dispute.

48. Additionally, the focus of the parties’ bargaining efforts over the six month period prior to this application was the relative merits of the “elect to work” model as compared to the more “institutional” work scheduling system urged by the union. Looking at that issue only, it is apparent that the parties have not moved whatsoever off their respective positions. Having regard to the evidence before me, there can be no question that the bargaining process has ground to a halt, and that such a situation can only reflect that the process has, to date, been unsuccessful.

49. The next inquiry that the Board must answer is whether it can be said that the process of collective bargaining can be said to have been unsuccessful because of one of the four enumerated reasons reflected by sections 43(2)(a) to (d) of the Act. As noted above, in my view this question also must be answered in the affirmative.

50. It is my conclusion that the process of collective bargaining has failed as a result of the position taken by the employer on the “elect to work” issue. It will be recalled that, by the end of the January 28, 1998 meeting, the employer had determined that it would “stand pat” on its proposal that the work at Kingston be assigned on the basis of an “elect to work” model. At the same time, the union had asked the employer if it was prepared to “open its books” to the union, so as to provide it an opportunity to review the various cost items of running Comcare’s operations in Kingston. Such an

inquiry is not unusual during the course of collective bargaining where an employer argues that it is unable to afford an increase in the compensation paid to its bargaining unit employees.

51. It is apparent from the employer's response to that request that it is unwilling to open its books to the union. Ms. Johnston, the employer's only witness, acknowledged in cross-examination that the letter which was sent to Ms. Leeder by Ms. McAlister did not respond to the question asked by Mr. Schachter at the January 28, 1998 meeting. However, that acknowledgement is merely one which considers the letter at face value. In my view, the letter does answer Mr. Schachter's question - in the negative. Quite simply, in context, that is the only conclusion that one can draw from the February 4, 1998 correspondence. Accordingly, by February 4, 1998, the employer's bargaining position was clear. In essence, it was saying to the union "we are of the view that it is not economically feasible to move off our position that the "elect to work" model be utilized in Kingston, and we are unwilling to provide you with the means of verifying that proposition".

52. The effect of the employer maintaining its position on the "elect to work" issue and the related question of "opening its books" has to put to an end the possibility that any resolution to the "elect to work" issue can be obtained through negotiation. There can be no dispute that the employer's position on the "elect to work" issue is driven, at least in part, by its desire to keep its costs low, in order to ensure that it remains competitive in the bidding process that occurs in and around the Kingston area. Accordingly, if the employer can demonstrate to the union that its legitimate costs are relatively high, there could well be a resolution to the "elect to work" issue and the monetary issues. On the other hand, without such a demonstration, the parties will continue to bang their respective heads against what each considers to be the other's relatively more rigid brick wall. No amount of bargaining will be able to resolve the key outstanding issues.

53. Accordingly, it is evident that the decision made by the employer to maintain its "elect to work" position, and to not provide open access to its "books" to the union, has caused the process of collective bargaining to become unsuccessful. Any possibility that the collective bargaining process could continue undoubtedly came to a halt at that point.

54. But this does not end the Board's inquiry. The next question that must be answered is whether the circumstances establish that the above-noted bargaining position adopted by the employer in this case is one of an "uncompromising nature" and is "without reasonable justification". I am of the view that the circumstances establish such a conclusion.

55. First, there can be no question that the employer's position during bargaining on the question of the need to implement an "elect to work" system in Kingston is one which can be regarded as being incapable of compromise. From the outset of the negotiations, the employer has claimed that an "elect to work" model is the only means of assigning work in the Kingston area that will maintain its competitiveness within the market in which it bids for work. As noted above, there was no dispute that Mr. Christie had described the "elect to work" system during negotiations as "the defining characteristic" of Comcare's Kingston operations.

56. Is this position - the need to maintain (or establish, depending on the viewpoint of the particular party) an "elect to work" system - one which has been adopted by the employer without reasonable justification? The Board's jurisprudence has considered the content of the word "reasonable" in the context of this provision. In *Formula Plastics Inc.*, [1987] OLRB Rep. May 702, the Board made the following comments about the meaning of the word "reasonable" in section 43(2) of the Act:

24. But was the employer's position taken without reasonable justification? Much depends on our interpretation of "reasonable" in this regard. Obviously, the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself.

However, in our view, “reasonable” must mean something more than simply a rational relationship between a bargaining position and a party’s self-interest ...

25. Rather, in our view, the word “reasonable” imports an objective element into our consideration of the respondent’s justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent’s view, or even from the applicant’s. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is made. In considering section [43(2)(b)] such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

28. The variety and social authority of the competing interest involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

In *Fort William Clinic*, [1997] OLRB June 406, the Board noted, at paragraph 105, that “a consideration of whether an employer has taken uncompromising bargaining positions without reasonable justification requires the Board to assess the content of the parties’ negotiating proposals with a view to making an objective determination as to their reasonableness”. The decision of *Bourque Consumer Electronics Service Inc.*, [1990] OLRB Rep. Aug. 821 was cited as authority for that proposition. See also *Crane Canada Inc.*, [1988] OLRB Rep. Jan. 13.

57. In accordance with this approach, I have considered with some care the circumstances of this proceeding. As noted above, the broader context of this application reflects a desire by the government to move the delivery of certain health care services to private sector providers, like Comcare. As a result of the tender and bidding process, it is evident that health care providers will have an incentive to minimize all of their costs (including the labour component of those costs) in order to remain competitive and make successful bids for work from local CCAC’s. I have no doubt that Comcare has the same goal as all other health care providers who bid on work from the Kingston CCAC - to make a lower bid than its competitors, and to acquire as much work as possible for its employees.

58. Comcare asserts that it is necessary to ensure that its assignment of work in Kingston is effected through an “elect to work” system. It claims that to move to the union’s proposed system of scheduling will cause it to incur greater costs, and make it uncompetitive in the Kingston area. It further argues that there are certain structural advantages to the “elect to work” model that makes it preferable to the union’s proposed system - in particular, the greater likelihood that a patient will experience continuity of care. The union agrees that there are certain inherent costs which will result from the adoption of the scheduling model that it proposes. At the very least, the “risk of down time” is the employer’s. As well, the payment of holiday pay is also of concern to the employer, and a move to the union’s proposed model will affect that element of the employer’s cost of doing business in Kingston. However, the union disputes the employer’s position that its work assignment structure will fail to provide continuity of care for Comcare’s patients.

59. From the standpoint of “continuity”, it appears to the Board that the employer’s justification of its system as one which delivers superior continuity is not well-founded. As was pointed out by

counsel for ONA during the course of argument, the factors relied upon by Comcare during bargaining as supporting the “elect to work” model are inherent in ONA’s model as well. Furthermore, having regard to Ms. Leeder’s testimony regarding the response by the employer to an instance when a number of the nurses employed by Comcare decided to become unavailable at the same time, it would appear that there is some legitimate argument to be made about the effect on continuity that the “elect to work” model reflects. This does not mean, though, that there are not any difficulties with the union’s model from a continuity perspective. But, having regard to the evidence before me, I am not satisfied that the “continuity” argument put to the union by the employer is a reasonable justification for its uncompromising position on the “elect to work” model.

60. Is it truly necessary to utilize an “elect to work” system of work assignment in order to keep the employer competitive in the Kingston home care nursing market? It must be kept in mind that Comcare is a “for profit” provider of those services. Some of its competitors are “for profit” providers, and others are “not for profit” providers of nursing services. Boiled down to its most rudimentary elements, Comcare’s profit from Kingston is the excess of revenues over its costs. If the adoption of a scheduling model in the nature of that proposed by ONA would have the effect of decreasing profits to a level still considered acceptable to the employer, then there is the possibility that bargaining could continue on the basis of the union’s model. In the alternative, if the profit margin for the employer at Kingston is minimal, or negative, then there is the possibility that the union may have altered its position on the “elect to work” issue.

61. Accordingly, the question arises as to whether the employer’s position that an “elect to work” system be adopted in Kingston is reasonably justified on the basis of cost. The only evidence before the Board supporting the employer’s position on this issue is its assertion during bargaining that it cannot afford to establish a model in the nature of the union’s. As noted above, the union acknowledges that its model contains inherent costs which will affect Comcare if adopted by the parties. There is, however, no evidence before the Board which establishes the extent of these costs, or their effect on the employer.

62. In a number of previous Board decisions, the Board has indicated in circumstances similar to those before this panel of the Board, that a party which claims that a position it has taken in bargaining is necessary for financial reasons ought to be prepared to justify that rationale. In *Grant Forest Products Corporation*, [1991] OLRB Rep. July 848, the Board made the following observations at paragraphs 56 and 57:

56. We were left with a number of unanswered questions about the company’s financial justification for the final offer. One of the major problems was that the financial information presented by the company was incomplete. Complete and accurate financial data is critical in this kind of case, if we are to determine whether the company’s financial condition provides reasonable justification for its position. More particularly, the financial documents presented by the company both to the union in bargaining and to the Board at the hearing raised more questions than they answered. ...

57. Excerpts from the company’s financial statements were presented to the Board at the hearing, but these were also somewhat selective. ... To determine if the company’s wage offer was reasonably justified by its losses, we needed to know the complete financial picture.

63. Similarly, in *Bourque Consumer Electronics Service Inc.*, cited above, the Board commented upon the failure of the employer to provide full economic data in that proceeding:

65. More important, in our view, than the survey the company did provide in negotiations, is the information it failed and refused to provide. The company declined several union requests for economic data to support the company assertions. Considering the magnitude of economic concession sought, we view this failure as unreasonable on the company’s part. So long as the company refused to provide such information, the union’s scepticism regarding the company’s claim could

hardly be expected to abate. In the circumstances of this case we find the company's refusal to be a further failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement.

66. Not only did the company fail to provide any data justifying its economic position during the course of negotiations, it also failed ... to provide any such information either as part of documentation filed or evidence tendered in support of its case. It was only as a result of cross-examination by the union and the union's consent to entering in evidence of a document not previously filed in accordance with Practice Note 18, that any specific economic data was brought to the attention of the union or the Board.

See also *Kraus Carpet Mills Limited*, [1991] OLRB Rep. Jan. 50, at paragraphs 17 and 18.

64. In the circumstances, there is no evidence to establish the reasonableness of the employer's bargaining position on the "elect to work" system as it relates to cost. The employer may be able to establish that, from a cost perspective, the implementation of a work scheduling structure in the nature of that proposed by ONA is highly prejudicial, when compared to the "elect to work" system that it desires to negotiate into the collective agreement. It has not yet done so. Before this panel of the Board, the only evidence on "cost" offered by Comcare is the employer's assertion throughout negotiations that the cost of departing from an "elect to work" system would make it uncompetitive in the Kingston market. The union's concession regarding the increased cost of its model does not establish the reasonableness of Comcare's position.

65. In my view, the employer's insistence on adopting an "elect to work" model was without reasonable justification. The evidence establishes that the employer is insisting on maintaining its position on the basis only of an assertion that the cost of moving off that position would make it uncompetitive in Kingston. It is unwilling to provide any information of substance to the union. Has the employer put any evidence before the Board to permit for the conclusion that there is a legitimate basis for its assertion? Merely asserting such a position before the Board in the context of a proceeding under section 43 of the Act is unsatisfactory. The employer must, when faced with such an application, establish some evidentiary basis before the Board so as to support its assertion that cost is a real and legitimate factor. The employer did not do so in this case.

66. The employer asserted that the circumstances of this proceeding were similar to those reflected by *Atway Transport Inc.*, [1991] OLRB Rep. Apr. 425. In that case, the Board concluded that the applicant's intransigence had caused the breakdown of negotiations, and did not grant the applicant's request for a first contract arbitration direction. There is no doubt that the union, in the case before the Board, was firm in its position respecting the work scheduling model it desired. However, it does appear from the evidence that the union was making limited efforts to seek some compromise acceptable to both it and the employer. In the face of those efforts, and in contrast to the facts reflected by *Atway Transport Inc.*, the employer's position was unreasonable and sufficiently rigid so as to be the cause of the breakdown in negotiations.

67. In the circumstances, then, I concluded that the position taken by the employer on the issue of the assignment of work - that an "elect to work" system was essential - was an uncompromising position taken without reasonable justification. In accordance with section 43(2)(b) of the Act, I granted this application on March 9, 1998.

68. In light of the above determination, I do not find it necessary or appropriate to deal with the applicability of sections 43(2)(c) or (d) of the Act to these facts.

4301-97-PS Canadian Union of Public Employees Locals 109, 1850 and 2750, Applicant v. **The Corporation of the City of Kingston**, International Brotherhood of Electrical Workers Local 636, C.A.W. Canada Local 4291 and Ontario Public Service Employees Union, Responding Parties v. The Association of Pittsburgh Township Employees, Kingston Professional Firefighters' Association, Pittsburgh Township Full Time Firefighters, Kingston Township Full Time Firefighters, Ontario Nurses' Association, Gary Hart, International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operations of the United States and Canada, Local 471, Interveners

Public Sector Labour Relations Transition Act - Successor municipality now including formerly separate public utilities commission - Parties disputing whether there should be a single "all-employees" bargaining unit or two bargaining units (including a "utilities unit") at successor municipality - Board finding that two bargaining units appropriate

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *Peggy E. Smith, Linda Clancey, Berry Patterson, David Cornwall and John Rogers* for the applicant for the applicant; *Alan Whyte, Carol Quirt, Bill Bishop, Jim Keech and Dianne Campbell* for the City of Kingston; *Phil Hunt, Peter Routliff, Alan Gates, Stefan Doliszney and Brenda Boles* for IBEW Local 636; *Lisa Kelly and Marilynne Lespearence* for CAW-Canada; *David Wright* for OPSEU; *Maureen Farson and Glenn Barnes* for the Association of Pittsburgh Township Employees; *Kristin A. Eliot, Fred LeBlanc, Kevin Galichon, Bob Belzile and Doug Blancher* for the Kingston Professional Firefighters Association; *Jacek Janczur* for ONA.

DECISION OF THE BOARD; May 20, 1998

1. This is an application under the *Public Sector Labour Relations Transition Act, 1997* ("the Act").
2. On May 4, 5, and 6, 1998, the Board held an extended "consultation" under section 37 of the Act. The purpose of that consultation was to receive the parties' further representations with respect to the briefs that they had filed, as well as to consider any other matters said to be relevant to the Board's authority to restructure bargaining units under section 22 of the Act.
3. At the completion of the consultation, the parties urged the Board to give a brief "bottom line" decision (with reasons to follow later, as necessary), so that they can get on with the process of "restructuring" at the City of Kingston - a process that has been ongoing for several months. Subject to several reservations, the Board is prepared to accede to that request; and, for ease of exposition, I will address the issues in a somewhat colloquial way.
4. The Board notes that Laidlaw Transport did not appear at the consultation, and that the OPSEU withdrew its intervention - on the understanding that, at this stage, OPSEU's interests are not affected by the orders being sought.
5. Having regard to the agreement of the parties, the Board directs the preservation of the current ONA bargaining unit of registered and graduate nurses, working at the Rideaucrest Home for the Aged. That unit is more particularly defined as "bargaining unit C", at tab 34 of the materials filed by the City of Kingston.

6. Having regard to the representations of the parties (and the agreement, on this point, of the City, CUPE and the CAW), the Board is satisfied that the transit workers (drivers and mechanics) currently represented by the CAW should be part of the broader "all-employee bargaining unit" proposed by CUPE. In the circumstances, there is no reason to preserve a separate bargaining unit of transit employees. Moreover, by letter dated May 13, 1998 the CAW has indicated that it does not wish to participate in any vote directed in respect of this revised "all-employee unit".

7. Having regard to the representations of the parties, the Board finds that the unit of firefighters appropriate for the successor City's operations should be framed this way:

all full-time firefighters employed by the Corporation of the City of Kingston, save and except Deputy Chief, persons above the rank of Deputy Chief, clerical support staff, volunteer firefighters and persons deemed by the *Fire Protection and Prevention Act, 1997* not to be firefighters.

8. The Board does not minimize the KPFA's concerns about full-time salaried firefighters "moonlighting" as "volunteers", since they are not "volunteers" in the usual sense (they are paid for it), and such "moonlighting" may overlap their regular responsibilities. However, I do not think that this issue is appropriately dealt with in the definition of the bargaining unit perimeter - particularly in light of sections 45 and 41(1) of the *Fire Protection and Prevention Act, 1997* which describe firefighters' bargaining units. Nor am I persuaded that the "union security arrangements" urged by the KPFA should be treated as a "bargaining unit definition issue" or included in the bargaining unit description.

* * *

9. The main issue dividing the City, CUPE and the IBEW is whether the employees of the formerly separate Public Utilities Commission should, like the transit workers, be folded into CUPE's proposed "all employee" bargaining unit.

10. Having considered the parties' briefs and representations, the Board is persuaded by the joint submission of the City and the IBEW, that there should be a separate bargaining unit encompassing employees working in the the City's utilities operations. The core of that proposed unit is an employee grouping (now represented by the IBEW) that has bargained separately and successfully for more than 40 years, and, in substance, is not substantially different from what the City and the IBEW might have agreed to, on their own, under section 20(4) of the Act.

11. What the City and the IBEW are proposing is, in substance, the preservation of the pre-existing bargaining structure at the former PUC, with some variations at the edges to take into account the new operational setting. In order to make the "utilities unit" consistent with the employer's new organization, it is necessary to transfer into that unit a handful of classifications (and perhaps employees) from the group now represented by CUPE, as well as transfer a few employees from the group now represented by the IBEW into the main "all-employee bargaining unit". But in both cases the numbers are not large, and do not compromise the essential character or size of each unit.

12. Now, there is, of course, much to be said for CUPE's proposal (supported by the CAW) that there be "one big all-employee bargaining unit". However, given the terms of Bill 136 and the particular collective bargaining history and circumstances of this case, the Board is persuaded that a "utilities unit" is appropriate for the new City's operation.

13. That said, the Board has several reservations about making any final order under section 22 at this time, or directing a vote under section 23.

14. First of all, while I am attracted to the particular "utilities unit" definition proposed jointly by the IBEW and the City on May 5, 1998, that revised definition was formulated in the course of the

consultation itself, and it appears to me that it is not completely congruent with the revised “all-employee unit” currently proposed (and now substantially represented) by CUPE. In other words, the perimeters of the “utilities unit” and the remaining “all-employee unit” still need some further “tidying up”, having regard to the functions of particular classifications, and the City’s operational needs in the utilities area.

15. I recognize the parties’ desire for finality, as well as the problems that the parties have already had in reaching agreements on this kind of issue. But that tidying up is best done by the parties themselves; and now that they know that there will indeed be a separate utilities grouping, the settlement dynamic may be a little different than it was before. It seems to me that, with the assistance of Board Officer Ed Hunt, the parties should now be able to finalize this matter.

16. Secondly, in the material before the Board, the exclusion portions of the proposed bargaining units may also require some further consideration, so as not to exclude from all units, individuals who are nevertheless “employees” under the *Labour Relations Act*. It is difficult to determine the individuals’ duties and responsibilities from their job titles. However, it is not evident that they all exercise managerial functions within the meaning of section 1(3) of the *Labour Relations Act*, nor is it evident that they would be regularly and materially involved in labour relations matters, so as to be “employed” in a confidential capacity pursuant to section 1(3) of the *Labour Relations Act*. And, of course, it makes no sense (at least in the absence of the agreement of the parties) to have pockets of non-union, non-managerial employees. On the other hand, as I observed at the consultation, the numbers are not great, so that this particular piece of “tidying up” need not necessarily delay any representation votes. Like the perimeter between the two units, this is something upon which the parties should now be able to agree, or agree to put aside until the City’s reorganization is closer to completion.

17. I am also troubled that the City is not in compliance with its minimum staffing/complement obligations under the main CUPE collective agreement. No order in respect of that default is necessary now. It suffices to say that this problem should be rectified if possible prior to the taking of any vote. In my view, CUPE should not be disadvantaged because of the City’s non-compliance with its collective bargaining obligations; moreover, it is worth noting that the validity of any vote might be thrown into doubt if a union’s margin of success were smaller than the number of disputed voters or ballots. That outcome is not in anyone’s interest.

18. The parties will have a further 21 days to meet with Board Officer Hunt with a view to finalizing the two bargaining-unit descriptions. I reiterate: I recognize the parties’ desire for finality in a fluid situation. However, it appears to me that the parties should be given a further opportunity to settle their remaining differences between themselves.

19. Finally, having considered Ms. Farson’s argument, I am not persuaded that there is any basis for an “interim order” respecting the seniority rights of the current “non-union” employees, who will eventually find themselves in a bargaining unit. The suggestion that they should be given seniority rights *now* in respect of whatever unit they will eventually join (*i.e.* after a final section 22 order is made) may have some equitable force. But, in my view, an order of that kind would be both inconsistent with the general scheme of the Act, and undesirable on labour relations grounds - especially given the rights of other employees, now covered by collective agreements. There is no reason why non-union employees should have broader mobility rights than those employees situated in existing units, and the implementation of such a scheme is fraught with practical difficulties.

22. The Board will remain seized with respect to all outstanding issues, and will schedule a further consultation if that appears to be necessary.

3858-97-PS The Corporation of Loyalist Township, Applicant v. Canadian Union of Public Employees and its Local 2150, Ontario Public Service Employees Union and its Local 445 and Service Employees International Union, Local 663, Responding Parties

Public Sector Labour Relations Transition Act - Parties disputing whether one bargaining unit (comprised of both full-time and part-time employees) or two bargaining units appropriate for successor municipality's operations - Board finding two bargaining units appropriate

BEFORE: *D. L. Gee*, Vice-Chair.

APPEARANCES: *Kees Kort, Arnold Adams, Diane Pearce and Sophia Duguay* for the applicant; *Risa Pancer, Gerry Patterson and Bill Craig* for Canadian Union of Public Employees; *John L. Stout, Garry Thayer, Andrew MacKenzie, Anita Raymond and Peter Allard* for Service Employees International Union.

DECISION OF THE BOARD; June 1, 1998

1. This is an application under sections 22 and 23 of the *Public Sector Labour Relations Transition Act, 1997* (the "Act"). A consultation was held on May 26, 1998.
2. At the consultation, it was agreed that the Board would hear submissions and render a decision on the issue of whether there should be one bargaining unit, comprised of both full and part time employees, or whether there should be two separate bargaining units, one for full-time employees and one for part-time employees, following which the parties would meet with a Board Officer and make arrangements for the conduct of a vote or votes. The parties agreed that the ballots cast by individuals in positions in dispute would be segregated and the issue of whether they were in or out of the unit would be remitted back to the Board if the successful trade union and the employer were unable to resolve the issue.
3. Loyalist Township is a successor employer within the meaning of section 3 of the Act. It is the result of the amalgamation of the Corporations of the Townships of Amherst Island ("Amherst Island") and Ernestown ("Ernestown") and the Corporation of the Village of Bath ("Bath").
4. Prior to the amalgamation, Ontario Public Service Employees Union and its Local 445 ("OPSEU") represented all employees of Amherst Island save and except Ferry Captains and Road Superintendent, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. The employees covered by the collective agreement between OPSEU and Amherst Island were ferry service employees and two roads employees. By way of agreement dated November 27, 1997, it was agreed that OPSEU would continue to represent a bargaining unit comprised of all ferry service employees of Loyalist Township save and except ferry captains, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation. It was further agreed that the roads employees would be covered by the collective agreement in force between Ernestown and Canadian Union of Public Employees and its Local 2150 ("CUPE"). The agreement in question constitutes an agreement under sections 20 and 21 of the Act. Accordingly, OPSEU advised the Board that it would not be participating in the consultation and takes no position concerning the appropriate bargaining unit(s) except that such unit(s) must exclude the ferry service employees.

5. CUPE represents employees of the predecessor employer Ernestown as follows:

The Employer recognizes the Canadian Union of Public Employees and its Local 2150 as the bargaining agent of all employees of the Corporation of Ernestown in the Township of Ernestown, save and except chief administrative officer/clerk, treasurer, general superintendent (Roads, Water and Landfill), recreation director, pool supervisor, township engineer, deputy clerk, fire chief, deputy fire chief, fire training officer, program administrator, planner, foreman of the roads department, employees regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

CUPE has had a 20 year collective bargaining relationship with Ernestown. There are currently approximately 33 full-time employees in the bargaining unit represented by CUPE. The part-time employees of the predecessor employer Ernestown are not unionized. The exact number of part-time employees has not been determined, however, there is no dispute that they number somewhere between 50 and 77.

6. Service Employees' Union, Local 663 ("SEU") was certified on October 18, 1996 to represent all employees of the predecessor employer Bath save and except Clerk Administrator and persons above the rank of Clerk Administrator. A first collective agreement was entered into on January 6, 1997. There are currently eight full-time employees in the SEU bargaining unit. There are no part-time employees. Prior to December 31, 1997 there were two part-time employees in the bargaining unit. One has become a full-time employee and the other has been laid off.

7. Loyalist Township and CUPE submit that two bargaining units, one full-time unit and one part-time unit, are appropriate. SEU submits that one all employee unit is appropriate. It is my determination that two bargaining units, one comprised of full-time employees and the other comprised of part-time employees, are appropriate. My reasons are as follows.

8. Section 22(1) of the Act grants the Board the discretion to determine the number and description of the bargaining units that "are appropriate for the successor employer's operations". Section 22(7) directs the Board to have regard to the purposes of the Act when determining the number and description of the bargaining units. The purposes of the Act are set out in section 1 as follows:

1. To encourage best practices that ensure the delivery of quality and effective public services that are affordable for taxpayers.
2. To facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations.
3. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances.
4. To foster the prompt resolution of workplace disputes arising from restructuring.

9. It is my view that two bargaining units will best serve the purposes of the Act and are appropriate for the successor employer's operations. Loyalist Township submits that two separate bargaining units are appropriate for its operations. It bases its request on the fact that, in overwhelmingly large part, the full-time employees of the predecessor employers have been represented separate and apart from part-time employees. There is in existence a long-standing collective bargaining relationship relating to the vast majority of the full-time employees which has operated successfully in the past with every indication that it will continue to do so in the future.

10. CUPE likewise argues in favour of two separate bargaining units. CUPE is by far the dominant trade union. It has had a collective bargaining relationship relating to a full-time bargaining

unit with Ernestown, which employed a significant number of part-time employees, for 20 years. It represents the vast majority of the unionized workers of Loyalist Township. CUPE, based on its 20 years experience, is of the view that the employer and the employees have been best served by full-time employees comprising their own bargaining unit and that there is no reason to disturb the status quo.

11. By contrast SEU has a relatively short collective bargaining relationship and, although it has bargaining rights for part-time employees, the reality is that its bargaining unit has historically been largely, and is currently exclusively, comprised of full-time employees. There is little practical experience upon which to judge the effect an all employee unit will have on the employer's operations.

12. On balance, I see no reason not to structure the bargaining units as urged upon me by the dominant parties to this application and feel that structuring the bargaining units in a fashion that will most closely maintain the status quo will best serve the purposes of the Act.

13. Accordingly, this matter is hereby referred to the Manager of Field Services for the appointment of a Board Officer to meet with the parties as expeditiously as possible for the purpose of making arrangements for the conduct of two separate votes. The voting constituencies, subject to any further agreements reached by the parties are as follows:

Bargaining unit #1

All employees of the Corporation of the Loyalist Township save and except supervisors/operators, department heads, persons above the rank of supervisor/operator and department head, ferry services employees, training officer, volunteer fire fighters, confidential secretary and persons regularly employed for twenty-four (24) hours per week or less and students employed during the vacation period.

Bargaining unit #2

All part time, casual and student employees regularly employed for not more than twenty-four (24) hours per week.

As agreed at the consultation, the ballots cast by any individuals in a classification in dispute will be segregated and not counted unless agreed to by the parties or ordered by the Board.

14. I am seized.

3467-95-OH Ontario Public Service Employees Union and James Slack, Applicants v. The Crown in Right of Ontario (Ministry of Solicitor General and Correctional Services (Metropolitan Toronto West Detention Centre), R.D. Phillipson, Nelson Cardoza and Michael Conry, Responding Parties

Health and Safety - Remedies - Correctional officer employed at maximum security holding facility twice suspended for engaging in work refusal - Board finding that correctional officer was acting in compliance with Occupational Health and Safety Act and seeking its enforcement when engaging in work refusal - Employer violating section 50(1) of the Act - Board directing that suspension be removed from employee's record, that employee be compensated for all losses and that employer post Board notice in the workplace

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *Ron Davis* for the applicants; *Stephen Patterson* and *Lianne Brossard* for the responding parties.

DECISION OF THE BOARD; May 1, 1998

1. This is a complaint filed pursuant to section 50(2) of the *Occupational Health and Safety Act* ("OHSA") alleging that the individual applicant was penalized for exercising his rights under that Act.
2. This matter was heard over a lengthy period as a result of various different delays. Many of the facts were ultimately not seriously in dispute, although the characterization of the events lay at the core of the parties' differences. At the conclusion of the hearing I ruled orally in respect of a portion of the complaint, finding that the corporate responding party (the "employer" or "Metro West") had violated section 50(1) of the OHSA in suspending Mr. Slack by letter dated November 27, 1995. I directed full compensation of any wages and benefits for the period of that suspension. I reserved on other matters. This decision provides my reasons in respect of the oral ruling and deals with all other aspects of the complaint.
3. Mr. Slack is a Correctional Officer ("C.O.") at Metropolitan Toronto West Detention Centre. Metro West is a maximum security holding facility for offenders waiting trial or transfer to other correctional facilities. Unlike a defined minimum to maximum security facility, Metro West houses all different kinds of offenders. There are three areas, adult male, female, and the young offender unit. This latter group are male, phase II offenders, that is, they are older than 16 years. Some are over 18 years having been charged with crimes committed while still young offenders. Mr. Slack was assigned to the young offender unit.
4. Certain assignments in the young offender unit include a C.O. being physically present within the living unit, referred to as the dayroom. The parties agreed that work on the young offender unit has inherent physical risks and that young offenders fight. Having regard to all of the evidence I am satisfied that in the usual course the dayroom assignment in the unit carries with it the greatest risk of physical injury for a C.O. By comparison, for example, C.O.s assigned to the adult male or female units are not required to be present in the living unit while inmates are out of their cells. Similarly while there are inherent risks during escort and other activities outside the dayroom, there is generally a higher probability for inmate cooperation and less intimate contact between inmates. By intimate I refer to the daily irritations of sharing space in the dayroom, for example, conflicts over the use of television or telephone, dealing with varying personalities and the like.
5. At issue in this complaint is discipline imposed as a result of events on November 10, 1995 and subsequent employer action in December 1995. The history leading up to these events requires review.
6. Mr. Slack was injured in a confrontation with a young offender in April 1995 and was away from work and in receipt of Workers' Compensation ("WC") benefits. He returned to work and was reinjured in an accident on July 20, 1995. Temporary total benefits were paid by the Workers' Compensation Board ("WCB") to September 8, 1995. At that time the WCB considered Mr. Slack fit to return to modified duties. Restrictions were outlined in a WCB letter of September 21, 1995. The WCB letter was received by Mr. J. Rutherford, the Manager of Staff Services at Metro West and the person responsible for managing WCB claims on behalf of the employer.
7. Mr. Slack was seen by two physicians during September 1995. On September 20, 1995 Mr. Rutherford received information from a Dr. Kelly that indicated Mr. Slack was capable of performing certain duties but was not capable of the full duties of a C.O. Dr. Prior, an orthopedic specialist, provided a report dated September 26, 1995 to the WCB which recommended a return to full duties.

The WCB Claims Adjudicator advised Mr. Rutherford of the contents of that report. According to Mr. Rutherford, it was that confusion that prompted a desire to clarify Mr. Slack's then current medical status, to get a prognosis for full return, and some confirmation of the level of impairment.

8. It was determined that Mr. Slack would be seen by a Dr. Heffernan, pursuant to the terms of the collective agreement which provide that the employer may require a medical examination where, for reasons of health, an employee is frequently absent or unable to perform his duties. A letter was forwarded to Dr. Heffernan dated October 26, 1995 from Mr. Rutherford, setting out the collective agreement provision, enclosing a completed release form from Mr. Slack and a list of correctional officer duties. The letter requests that Dr. Heffernan address three issues; the nature of the illness or injury and whether it affected the ability to perform the full duties of a C.O.; an assessment of the likelihood of future regular attendance; and advice as to any restrictions or limitations to assist the employer in determining an appropriate course of action.

9. That examination was conducted on October 30, 1995 and Dr. Heffernan's report is dated November 3, 1995 (the "mandatory medical"). That report reviews the medical history and addresses the specific issues as follows:

Specifically addressing the issues raised in your letter of October 26, 1995.

1. At present due to ongoing weakness and discomfort in his right shoulder *I do not feel Mr. Slack is capable of safely carrying out his duties as a correctional officers. The areas where he would be at risk and possibly put other officer[s] at risk would be:*

- i. His ability to restrain and subdue hostile offenders.
- ii. His ability to carry out riot control.
- iii. His ability to safely search offenders.
- iv. His ability to ensure the safety and security of offenders.

Because of the above, his ability to assume the responsibility for a living unit of up to 60 offenders. [sic] He also expressed concern about carrying the M.S.A. air mask equipment on his back with a strap pulling on his right shoulder.

2. In order for Mr. Slack to attend work regularly and perform his correctional officer duties I feel he will require a specific work hardening program carried out under the supervision of a trained physiotherapist. He would require a weight training program to strengthen his right shoulder and the surrounding muscles. I feel this strengthening program would take eight to nine weeks and I would recommend he attend at the King Cross Physiotherapy in Brampton for this. *After eight to nine weeks he should be able to carry out his duties as a correctional officer keeping in mind his restrictions regarding second hand smoke.*

3. *At present his restrictions should be as outlined in the letter written to Mr. Slack by the WCB on September 1, 1995. Specifically*

- Non-repetitive right shoulder movement
- No heavy lifting
- No above shoulder activity and repetitive use of the right upper extremity against resistance.

[emphasis added]

10. Dr. Heffernan goes on to conclude that in his opinion Mr. Slack has a temporary disability but is capable of modified duties if able to be organized in addition to a work hardening program. He recommends duties not unlike those reviewed in the WCB September 21, 1995 letter, and continues the work restrictions outlined in that same letter.

11. On November 6, 1995 Mr. Rutherford met with Mr. Slack and confirmed the meeting with a memo. That memo acknowledges receipt of the mandatory medical "which indicates that you will require" modified duties for up to two months. Mr. Rutherford also states:

Please note that you have been deemed fit to return to your pre-injury position by the Workers' Compensation Board, therefore, there is no legislated requirement for the employer to accommodate restrictions imposed by your physician regarding the compensable injury. However, in an effort to assist you in returning to full duties, the following accommodation will be provided.

You will be assigned to the front lobby desk of the male unit. You can perform all the duties of that area except responding to emergencies codes. You will not become involved in any use of force situations, nor will you assist in the lifting of any person or object weighing in excess of 10 kg.

12. Also on November 6, 1995 the WCB wrote to Mr. Slack indicating that it had reviewed his claim and the report of Dr. Prior. The Claims Adjudicator finds that effective September 26, 1995 Mr. Slack was fit to return to pre-accident (full) duties. Prior to meeting with Mr. Slack and making the offer of modified duties Mr. Rutherford had spoken with the Claims Adjudicator and was aware of the WCB's position. He had requested that a copy of the letter be faxed to him and it appears that he received it later that day.

13. On November 7, 1995 Mr. Rutherford met with Mr. Slack and a union representative and withdrew the offer of modified duties on the basis that the WCB had reviewed Dr. Prior's report and had deemed Mr. Slack able to return to full duties effective September 26, 1995. Mr. Rutherford was aware that the WCB had not reviewed the mandatory medical. He testified that he spoke with the Claims Adjudicator on November 6, 1995 and disclosed the contents of that report and that the Claims Adjudicator advised him that the WCB would prefer the report of the orthopedic specialist.

14. The employer's change of heart was explained on the basis that at the time of the offer of modified duties Mr. Rutherford did not have written confirmation of the WCB's position. There was considerable evidence surrounding this action by Mr. Rutherford. There is no explanation as to why Mr. Rutherford, in the absence of written confirmation, did not merely wait one day for WCB's written response. Although Mr. Rutherford suggested that his offer was a prudent one until such time as he received the WCB determination, the offer of modified work extends far beyond what would be required in that circumstance. It provides a two month period of modified work, with a scheduled review in December 1995 and January 1996. Mr. Rutherford's explanation that he should have written the memo more fully does not clarify the matter. It was written very fully, but evidenced an entirely different intention from accommodating for a day or two while waiting for written confirmation from the WCB. The memo is also clear that the offer was made irrespective of the WCB's position.

15. According to Mr. Conry, the Deputy Superintendent of Metro West, it was his direction to Mr. Rutherford that Mr. Slack be assigned to full duties given the WCB's position. Mr. Conry was aware of the contents of the mandatory medical at the time and the fact that the medical had been obtained at the behest of the employer. Mr. Conry stated that he took from both the WCB position and the mandatory medical that Mr. Slack was not 100% but could still perform full duties. This explanation belies the words of the mandatory medical. The only explanation as to why the offer of modified duties was withdrawn was that the employer relied exclusively on the WCB's position. Both Mr. Phillipson, the Superintendent of Metro West, and Mr. O'Rourke, the Manager of the Young Offender Unit, are copied on the memo withdrawing the assignment of modified work and directing a return to full duties.

16. Both in person and by that November 7, 1995 memo Mr. Rutherford advised Mr. Slack that effective November 7, 1995 Mr. Slack was assigned full duties on Unit 4A (more particularly the dayroom assignment) and that the assignment was to be without restrictions. On November 7, 1995, in the face of the withdrawal of modified work, Mr. Slack requested accommodation based on the mandatory medical. The evidence surrounding who had the authority and/or ability to deal with that request is troubling at best.

17. Mr. Rutherford explained that he dealt with the request for accommodation strictly from the WCB aspect and that he suggested to Mr. Slack that if he wanted to pursue it he could speak to Mr. O'Rourke. Mr. Rutherford advised Mr. O'Rourke of the WCB decision, provided him with the WCB letter, and told him Mr. Slack was seeking accommodation. Mr. Rutherford apparently also told Mr. O'Rourke that the request was now beyond Mr. Rutherford's authority, notwithstanding the fact that Mr. Rutherford appeared able to make the earlier offer in the express absence of WCB direction. Further, Mr. Rutherford testified that, at that time, he was the person who would respond to requests for accommodation from employees on a return to work from non-compensable injuries in accordance with the Ontario Public Service written policy directive concerning accommodation in employment for person with disabilities. It also contradicts Mr. O'Rourke's evidence that in his view any determination of modified duties was at that time Mr. Rutherford's responsibility. In his evidence, Mr. O'Rourke evidenced no particular authority to provide modified duties and he relied entirely on Mr. Rutherford's assessment.

18. One might conclude from this evidence that there are serious gaps in the assignment of responsibilities and/or understanding of those responsibilities when it comes to assessing requests for accommodation and modified duties. Alternately, no one dealt with the request, or more likely, neither Mr. Rutherford or Mr. O'Rourke was the real decision-maker in this instance. In any event however Mr. Rutherford left Mr. Slack with the clear impression that Mr. O'Rourke did have the authority to consider and assign modified duties even if Mr. Rutherford could not.

19. Mr. Rutherford testified that he told no one other than perhaps Mr. Phillipson of the contents of the mandatory medical, including the restrictions, because he considered it confidential. This appears to at least partly contradict his earlier evidence to the effect that he would advise supervisors of the nature of any restrictions on a worker returning. Between November 7 and 10, 1995 Mr. Rutherford could recall no further discussion with Mr. Slack regarding accommodation. Specifically, he could not recall Mr. O'Rourke asking him about the mandatory medical between November 6 and 10, 1995.

20. Mr. Slack and Mr. Olsen, a local union representative, met with Mr. O'Rourke on November 7, 1995 in the afternoon. Mr. Slack again requested modified duties and referred to the auxiliary post. According to his own evidence, Mr. O'Rourke responded by indicating that he was satisfied the information he had from Mr. Rutherford was accurate and he was not prepared nor capable of offering modified duties. Mr. Slack had the mandatory medical and advised Mr. O'Rourke that it concluded he had restrictions. Mr. O'Rourke neither asked for it nor read it. He reiterated his acceptance of the information he had obtained from Mr. Rutherford. He stated he was not prepared to get into a debate over conflicting medical views. Subsequently in cross-examination Mr. O'Rourke stated that he would pay attention if a doctor specifically told him that a C.O. had restrictions on his abilities that cause concern for his safety and that of others. He did not pay attention here.

21. On November 7, 1995 Mr. O'Rourke told Mr. Slack that he would speak to Mr. Phillipson and see if anything else was to be done and that he would inform Mr. Slack of those discussions prior to his next shift. He later described this offer as "purely a gesture that I wasn't shutting (Slack) out".

22. Mr. O'Rourke did speak with Mr. Phillipson with no resulting change in the employer's position. Although Mr. O'Rourke could not specifically recall, he was of the view that he told Mr.

Phillipson of the mandatory medical and that there was some discussion of it. If I accept Mr. Rutherford's evidence that he would not disclose the contents of the mandatory medical, the nature of any discussion between Mr. O'Rourke and Mr. Phillipson concerning that medical is not apparent and would necessarily be incomplete. Alternately one or both had read it and treated its contents as somehow irrelevant. Mr. Phillipson did not testify. Mr. O'Rourke did not speak to Mr. Slack before his next shift. He did speak with Mr. Cardoza and advised him that when Mr. Slack reported for duty he was to be assigned to full duties. Mr. Cardoza was the shift supervisor on Mr. Slack's next scheduled shift, the night shift on Friday November 10, 1995.

23. Mr. Cardoza is the Manager of the Staff Training Department at Metro West. On November 10, 1995 he was acting as shift supervisor for the 12-hour night shift. He had been a member of the health and safety committee for approximately three years and had some limited prior experience in health and safety.

24. While there was some disagreement as to precise words and times, and a clear dispute as to the characterization of events, the essential facts that ultimately led to Mr. Slack's suspension are not in dispute. On November 10, 1995 Mr. Slack reported for duty. During the regular muster Mr. Cardoza told Mr. Slack he was assigned to Unit 4A, full duties (the dayroom assignment). After muster Mr. Slack informed Mr. Cardoza that he was not to work full duties. Mr. Cardoza had contrary information. There was a dispute as to the words used; the employer taking the position that Mr. Slack told Mr. Cardoza that he was assigned to modified duties and/or that he did not have to work full duties, in an attempt to deceive Mr. Cardoza. It is probable that Mr. Slack took an aggressive posture with Mr. Cardoza in an attempt to have him address the mandatory medical. Mr. Slack sought and received permission from Mr. Cardoza to obtain documentation from his car. Mr. Slack returned with a file and told Mr. Cardoza he had a letter from a doctor (the mandatory medical) outlining the restrictions on duties he could perform. Mr. Cardoza asked Mr. Slack if he had received Mr. Rutherford's letter (referring to the November 7, 1995 memo). Mr. Slack acknowledged that he had. Mr. Slack also confirmed that Mr. Rutherford and Mr. O'Rourke were aware of the mandatory medical with no resulting change in assignment. Mr. Cardoza asked Mr. Slack if he had any information not yet considered by Mr. O'Rourke and Mr. Slack advised he did not.

25. Mr. Cardoza told Mr. Slack he was assigned to Unit 4A on full duties and asked him to comply. He did not seek to review the medical information. According to Mr. Cardoza, Mr. Slack indicated he could not respond without a union representative. Although Mr. Cardoza advised that he had no obligation to provide such an opportunity, he allowed Mr. Slack to find a representative and return to discuss the matter further.

26. There is a dispute between the parties as to the amount of time that then elapsed before the conversation continued. Mr. Slack was not able to locate a union representative. Mr. Cardoza did not assist in that effort. On his return to the office Mr. Cardoza instructed Mr. Slack to report to Unit 4A. Mr. Slack requested an accommodation in his work assignment. Mr. Cardoza acknowledged that he understood that Mr. Slack was requesting an accommodation but he interpreted the request as a favour pursuant to which Mr. Slack would agree to work.

27. Mr. Cardoza asked Mr. Slack if he understood the order to report to Unit 4A on full duties. Mr. Slack confirmed that he did. He did not however make any move to go. Mr. Cardoza asked if he was refusing the order and Mr. Slack did not reply. Mr. Cardoza then informed Mr. Slack that he would take his silence as a refusal. After waiting and then ordering him again, Mr. Slack then said no. Mr. Cardoza then suspended Mr. Slack for refusing to comply with the order to report for full duties and instructed him to report to the Superintendent's office (to Mr. Conry) on the Tuesday following that long weekend. Mr. Cardoza took Mr. Slack to the staff lounge and in response to a further request for

union representation Mr. Cardoza advised Mr. Slack that providing a union steward was not his responsibility. Mr. Slack did have a brief opportunity to speak to another C.O. in the lounge. Mr. Cardoza subsequently instructed Mr. Slack to leave the premises which he did. Mr. Slack stated that he was leaving under duress and that he didn't agree with Mr. Cardoza's decision.

28. Mr. Slack contacted the Ministry of Labour, Occupational Health and Safety Branch, from his home to report these events. An inspector called Mr. Cardoza and told him that Mr. Slack had taken the position that he had been suspended as a reprisal for refusing to work on health and safety grounds. Mr. Cardoza took the position that Mr. Slack had been suspended for refusing to perform work and that no health and safety issue was involved. Although Mr. Cardoza stated that the inspector only "suggested" conducting a stage one investigation under the OHSA, it is clear the inspector expected Mr. Cardoza to contact her to inform her of the results of that investigation.

29. A number of phone calls back and forth between Mr. Cardoza and Messrs. O'Rourke and Mr. Conry and conversations between Mr. O'Rourke and Mr. Conry then occurred. Mr. Cardoza stated that he recounted the events as they had occurred with Mr. Slack and therefore it was likely that both Mr. O'Rourke and Mr. Conry were aware that Mr. Slack had referenced the mandatory medical in the context of his refusal and request for accommodation. There was a consensus among these employer representatives that there was no work refusal and that the suspension should stand. A decision was made, apparently by Mr. Conry, not to conduct a stage one investigation as the employer took the position that no health and safety issue was involved. This decision was communicated to the inspector and to Mr. Slack.

30. The inspector did attend at Metro West later that night to investigate. The inspector's report indicates she requested the presence of the refusee and a worker member of the joint health and safety committee. Apart from employer representatives only a senior employee on the night shift attended. There was no evidence that she had any opportunity to speak with Mr. Slack or that she had any health and safety experience. Mr. Slack was not called back to the institution. Mr. Cardoza did not accept any responsibility for these shortcomings saying it was not his meeting and that the inspector had only asked for someone from the union and the employee was a union member. Yet he also stated he was aware of section 43(7) of the OHSA meaning he either understood or ought to have understood that the employee was not qualified under the terms of the OHSA to act in a representative capacity. Further, Mr. Conry acknowledged that, under the protocol established before the employer and the trade union for dealing with work refusals and the resulting investigation, it was the employer's responsibility to ensure the presence of a health and safety committee person.

31. This evidence speaks to the employer's motive in ultimately dealing with Mr. Slack. The employer was unwilling to pursue or to ensure an appropriate process for the inspector's investigation. It had already made its decision. To take the position that there is no work refusal and no health and safety issue and thereby ignore the protocol is to ignore the very dispute. It is not open to an employer to make such a unilateral decision and ignore the third party process to have that very issue considered. Further, having allowed this flawed process, where only the employer's position was heard, the employer subsequently relied on the inspector's report in support of its position that there had been no work refusal. Mr. Cardoza agreed that he likely did not tell the inspector of the mandatory medical as it was not mentioned in her report. The inspector's brief report indicates that Mr. Cardoza stated that the worker declined to carry out orders and was therefore sent home. The report concludes that this was not a work refusal and further investigation could not be conducted due to the absence of the worker.

32. On November 14, 1995 when Mr. Slack reported to Mr. Conry he was told there would be a disciplinary hearing on November 16th to consider the allegation that on November 10, 1995 his actions to Mr. Cardoza were insubordinate. Mr. Conry advised Mr. Slack that he would have to perform

full duties on his next assigned shift, November 15, 1995. Mr. Ford, the union local's Vice-President, took the position that the events of November 10 were a work refusal under the OHSA and reiterating, based on the mandatory medical, that Mr. Slack was not fit for full duties. Mr. Conry maintained the position that Mr. Slack was fit. Both positions were confirmed in writing by Mr. Conry at the request of Mr. Ford. By this time Mr. Conry was aware of the restrictions set out in the mandatory medical.

33. As a result of that meeting with Mr. Conry, the Ministry of Labour was again called in and an investigation was conducted by Ministry health and safety inspectors on November 15, 1995. The inspector's report concludes that as violence is an inherent part of the work there was no right to refuse under section 43 of the OHSA. The report goes on however to confirm that other provisions of the OHSA apply, that the worker is protected from reprisals, and concludes that the issue is likely able to be resolved by the workplace parties. Mr. O'Rourke recalled reference by the inspector to the obligation of a supervisor to take every reasonable precaution in the circumstances to protect a worker. The report concludes:

The employer should note that the most recent medical opinion must be seen as the medical report to be relied on.

34. Mr. Rutherford was present at that meeting and understood that it was the inspector's opinion that the mandatory medical should dictate the parties' actions and that the parties should resolve the issue of accommodation between themselves. Mr. Rutherford also agreed that the Ministry report stated that according to the mandatory medical, Unit 4A was not a safe place for Mr. Slack to work. Mr. O'Rourke stated the inspector found there was no work refusal but then agreed that the report only found that there was no right to refuse. Mr. O'Rourke agreed that this did not mean that the employer could punish Mr. Slack with impunity. He stated that Mr. Slack was not being punished for a refusal because in his view there was no indication there was a health and safety refusal. Mr. O'Rourke offered that part of the employer's meeting with the inspector resulted in a discussion of the validity of the WCB decision versus the mandatory medical. After this meeting Mr. Slack was assigned to modified duties in line with the restrictions in the mandatory medical, although probably because other assignments were filled by this time in the shift. Messrs. Cardoza and O'Rourke also attended that meeting.

35. Following the inspector's meeting Mr. Conry met with Mr. O'Rourke and Mr. Monteiro, the employer's representative on the health and safety committee and Deputy Superintendent of Services. From Mr. Monteiro's advice Mr. Conry concluded that the only relevance to the inspector's report was the fact that no orders were made against Metro West. While that opinion may reflect the narrow view of what Metro West may or may not have been required to do by the inspector, it speaks not at all to the exercise of its other obligations under the OHSA. The inspector has no authority to deal with reprisals.

36. A disciplinary hearing was held on November 16, 1995. Mr. Slack and the union took the position throughout that his actions constituted a work refusal, that it was not a matter of insubordination, and that the hearing itself constituted a reprisal under the OHSA. Mr. Conry confirmed that Mr. Slack understood he had been assigned to full duties by Mr. Rutherford and Mr. O'Rourke, and that he had worked the auxiliary post (not a modified position in his view) on November 7, 1995 without incident or complaint. Mr. Conry was aware of the conflicting medical evidence.

37. By letter from Mr. Conry dated November 27, 1995 Mr. Slack was suspended effective November 30, 1995 without pay for 10 shifts (a total of 92 hours). The letter provides in part:

In conclusion, I find it necessary to remind you of how serious I consider this offence. You had clear information and instructions from both Mr. Rutherford, Staff Services Manager, and Mr. O'Rourke, Manager, Young Offender Programs, as to management's position with regards to your employment status. You completed a tour of duty on November 7th, 1995, assigned to full duties of

a correctional officer without incident or concerns. Furthermore, you attempted to undermine Mr. Cardoza's right to manage the young offender unit by your actions on Friday, November 10th, 1995.

This type of conduct will not be tolerated. I expect there will not be a recurrence of this offence, however, if there is, I must inform you that a more serious penalty will be imposed, which may include dismissal.

38. The union met with Mr. Phillipson on November 30, 1995. Mr. Phillipson did not rescind the suspension.

39. On December 4, 1995 Mr. Slack wrote to Mr. Conry challenging the suspension and taking the position that Mr. Conry was ordering him to report for work which was unsafe. Mr. Conry understood that Mr. Slack was raising a health and safety issue concerning his return to work following the suspension. Mr. Slack also wrote to Mr. Phillipson on December 19, 1995 advising the employer that his return to assigned duties was "under duress" and clearly raising the health and safety risks he continued to assert.

40. Mr. Slack returned to work on December 20, 1995 following the suspension and was again assigned full duties on Unit 4A. Mr. Slack gave the shift supervisor a copy of his letter to Mr. Phillipson at the outset of that shift. Later that afternoon Mr. Rutherford met with Mr. Slack regarding his return to work. In that meeting Mr. Slack advised Mr. Rutherford that the WCB had extended benefits to October 30, 1995 and that he was appealing its denial of benefits after that date. As a result of this information Mr. Rutherford took the view that Mr. Slack was fit to return to full duties as of October 30, 1995. Mr. Rutherford indicated that he may have met with Mr. Conry prior to this meeting, although he was not certain. Mr. Rutherford also took the view that this meeting was solely to discuss Mr. Slack's WCB status notwithstanding the fact that Mr. Slack and Mr. Olsen continued to attempt to raise the limitations as a health and safety issue.

41. That meeting was followed up with a memo from Mr. Rutherford. The memo reiterates the employer's position that it adopted the WCB finding that Mr. Slack was fit to return to full duties and stated that it was the employer's expectation that he do so immediately. The memo states, "failure to do so may result in your removal from payroll". Mr. Rutherford denied that this was any kind of threat of dismissal or other reprisal. He testified that he was referring to the use of vacation credits or lieu time but agreed that if those credits were used Mr. Slack would remain on the payroll and that the words used did not convey the meaning he asserted. In re-exam he explained that once credits were exhausted an employee would be off the payroll and that he was unaware of the status of Mr. Slack's credits. Mr. Conry understood the words "not on payroll" as meaning "not being paid" and asserted this was common terminology in the institution.

42. On December 21, 1995 the Ministry inspector completed a field visit report in respect of Mr. Slack's return to work. That report notes that Mr. Slack took the position that he was being assigned duties that he was not medically fit to perform safely. The report further notes that the Ministry's position remained unchanged; that the last medical report must be relied on. The inspector indicates that the matter is primarily one of accommodation.

43. On January 3, 1996 Dr. Heffernan provided a medical note continuing the same restrictions as in his earlier report until the physiotherapy was completed. As a result of that note Mr. Slack was sent home by the shift supervisor because he could not provide modified work. When Mr. O'Rourke became aware of the note it did not cause him to re-think Mr. Slack's assignment on Unit 4A.

44. Subsequently on January 12, 1996 Mr. Slack was injured at work during an inmate altercation and was subsequently accommodated on a light duty assignment.

45. While this was ongoing the WCB had extended temporary total disability benefits to Mr. Slack for the period ending October 31, 1995; a change from the earlier finding that he was fit for full duties as of September 26, 1995. Subsequently on January 29, 1996 the WCB further extended Mr. Slack's temporary total disability benefits beyond October 31, 1995 based on the medical information provided by Dr. Heffernan. The WCB also concluded that the work offered after November 6, 1995 by the employer was not suitable given the medical restrictions. The employer appealed both extensions of benefits. The WCB subsequently scheduled surgery for Mr. Slack's shoulder in September 1996.

46. I heard a considerable amount of evidence about the various duties and responsibilities of the C.O. assigned to the dayroom, the auxiliary post, and other assignments. It is not necessary to review that evidence in detail. Although the employer took the position that an assignment to the auxiliary post was a full duty position, it is clear that the general duties of an auxiliary officer would expose that officer to less risk in the normal course than an assignment to the dayroom.

47. The primary duty of the auxiliary officer on the night shift (1845 to 0700) is escorting young offenders for visits. The C.O. also has responsibilities in respect of snack, picking up the count at lockdown, data entry, processing new admissions, and responding to codes (various kinds of emergencies). The auxiliary C.O. may also be assigned to pick up young offenders who are misbehaving in open custody arrangements and transfer them back to secure custody. The only responsibility that would normally involve entering the dayroom would be in response to a code and only after ensuring that any inmates on escort have been secured. While no area or activity in the facility is free of risk, it was not disputed that the bulk of incidents causing greater potential for risk occur in the dayroom. Contrary to the assertion of the employer, the fact that Mr. Slack completed a night shift on November 7, 1996 safely, while assigned to the auxiliary post, and in the absence of any evidence of any incident, speaks little, if at all, to his ability to safely perform the full duties of a C.O. in the dayroom or elsewhere on an ongoing basis.

48. Similarly while the employer took the position that there were no modified duty positions in the young offender unit, it was apparent that on various and regular occasions the employer accommodates and assigns modified work. That was evident even from those occasions where the employer did accommodate Mr. Slack.

49. I also heard a considerable amount of evidence as to the precise chronology and timing of the interaction between Mr. Cardoza and Mr. Slack on November 10. Much of that evidence was led to refute the employer's suggestion in evidence that Mr. Slack took too long in finding a union representative and was otherwise not acting responsibly. I am satisfied that Mr. Cardoza exaggerated the time taken by Mr. Slack given the discrepancy between his evidence and the entry in the log book indicating that Mr. Slack was escorted out of the sally port doors by 7:20 p.m. However none of this evidence was of any consequence except perhaps as small corroboration of the employer's antipathy toward Mr. Slack.

* * *

50. The relevant provisions of the OHSA provide:

25. (1) An employer shall ensure that,

(a) the equipment, materials and protective devices as prescribed are provided;

(b) the equipment, materials and protective devices provided by the employer are maintained in good condition;

(c) the measures and procedures prescribed are carried out in the workplace;

(d) the equipment, materials and protective devices provided by the employer are used as prescribed; and

(e) a floor, roof, wall, pillar, support or other part of a workplace is capable of supporting all loads to which it may be subjected without causing the materials therein to be stressed beyond the allowable unit stresses established under the Building Code Act.

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;

• • •

(c) when appointing a supervisor, appoint a competent person;

• • •

(e) afford assistance and co-operation to a committee and a health and safety representative in the carrying out by the committee and the health and safety representative of any of their functions;

• • •

(h) take every precaution reasonable in the circumstances for the protection of a worker;

• • •

27. (1) A supervisor shall ensure that a worker,

(a) works in the manner and with the protective devices, measures and procedures required by this Act and the regulations; and

(b) uses or wears the equipment, protective devices or clothing that the worker's employer requires to be used or worn.

(2) Without limiting the duty imposed by subsection (1), a supervisor shall,

(a) advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;

(b) where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker; and

(c) take every precaution reasonable in the circumstances for the protection of a worker.

28. (1) A worker shall,

(a) work in compliance with the provisions of this Act and the regulations;

• • •

(d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.

• • •

(2) No worker shall,

• • •

(b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker; or

• • •

43. (1) This section does not apply to a worker described in subsection (2),

(a) when a circumstance described in clause (3) (a), (b) or (c) is inherent in the worker's work or is a normal condition of the worker's employment; or

(b) when the worker's refusal to work would directly endanger the life, health or safety of another person.

(2) The worker referred to in subsection (1) is,

• • •

(c) a person employed in the operation of a correctional institution or facility, a training school or centre, a place of secure custody designated under section 24.1 of the Young Offenders Act (Canada) or a place of temporary detention designated under subsection 7 (1) of that Act or a similar institution, facility, school or home;

• • • j3 (3) A worker may refuse to work or do particular work where he or she has reason to believe that,

(a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;

(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; or

(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

• • •

50. (1) No employer or person acting on behalf of an employer shall,

(a) dismiss or threaten to dismiss a worker;

(b) discipline or suspend or threaten to discipline or suspend a worker;

(c) impose any penalty upon a worker; or

(d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.

51. The issue before me was whether the employer had penalized Mr. Slack because he had either acted in compliance with the OHSA and/or the regulations or had sought the enforcement of same. The purpose of section 50 of the OHSA and the nature of the exercise before me has been reviewed in a number of cases and is not new or novel. It is incumbent on the employer to show, on a balance of probabilities, that the disciplinary action was not motivated, even in part, because the workers was acting in compliance with the OHSA or its regulations and/or was seeking the enforcement

of same. (See *Inco Metals Co.* [1980] OLRB Rep. June 836; *Commonwealth Construction Company* [1987] OLRB Rep. July 961; *Art Shoppe* [1988] OLRB Rep. Aug 729; *Meridian Magnesium Products Limited* [1996] OLRB Rep. Dec 964).

52. There is no doubt that the employer had an overriding view as to Mr. Slack's motive in pursuing a modified assignment. In the letter of suspension Mr. Conry interpreted Mr. Slack's actions in attempting to revisit the issue of his assignment on November 10, 1995 as manipulative, as neither Mr. Rutherford or Mr. O'Rourke were in the building and Mr. Cardoza was not the regular supervisor. Yet Mr. Slack showed up for work, and during muster, was given an assignment to the dayroom on Unit 4A in circumstances where Mr. Slack could not and did not know whether Mr. O'Rourke had spoken with Mr. Phillipson as promised, or whether anyone had spoken to Mr. Cardoza. When he approached Mr. Cardoza he had no information as to the state of the employer's internal communication. He had not heard from Mr. O'Rourke. Mr. Slack also had no way of knowing that Mr. O'Rourke's promise was merely a "gesture" with no possibility of a different response. Mr. Slack had also been given a different assignment on November 7. In these circumstances it is difficult to conclude that manipulation was at the root of Mr. Slack's attempt to again raise the issue with Mr. Cardoza. Yet that is precisely how Mr. Conry interpreted Mr. Slack's actions.

53. Mr. Conry relied on Mr. Slack having told Mr. Cardoza that he was granted and approved modified duties. Even ignoring Mr. Slack's understanding that Mr. Phillipson would be asked to review his request and interpreting Mr. Slack's actions as taking the opportunity to pursue the matter again, construing it as somehow manipulative, at worst it represents a last ditch attempt to have the employer respond to the mandatory medical, a motivation that, in the circumstances, seems hardly culpable.

54. It was evident throughout these proceedings that the usual hierarchical and relatively militaristic structure utilized by the employer, while no doubt very useful and appropriate in many circumstances had the effect of limiting the employer's ability to differentiate between the exercise of legitimate employee rights and a challenge to authority. The management members of Metro West involved in this complaint think Mr. Slack is avoiding work, is exaggerating his medical condition, that he inappropriately challenges authority, and is, at best, a problem employee.

55. The employer argued that this matter depended on a determination of Mr. Slack's credibility. I disagree. Even assuming that Mr. Slack was seeking a preferred assignment he was entitled to assert that position based on the mandatory medical. Reading the mandatory medical and its detailed response to the particular duties of a correctional officer provides independent objective evidence of a health and safety problem. The report is abundantly clear and cannot be interpreted otherwise. Having sought the medical opinion specifically to assist in providing some clarity in respect of Mr. Slack's medical condition, the employer apparently did not like the results. The employer had reached a view concerning Mr. Slack's motivation which required it to ignore Dr. Heffernan's letter. And each individual acting on behalf of the employer did ignore it.

56. In submissions the employer agreed that a correctional officer does have a limited right to refuse work under section 43 of the OHSA. That right is recognized in the protocol for dealing with work refusal situations established between the union and the Ministry of Correctional Services and filed in these proceedings. The right to refuse is described in section 43 in the negative and it is perhaps easier to understand when described as it is by Exhibit R-17, a document prepared for the use of employees:

Persons employed in the operation of a correctional institution or facility,... have a conditional right to refuse unsafe work under Section [43]. These workers may exercise their right to refuse where

the circumstances which prompted the refusal is *not* inherent in the work;

- . the circumstances which prompted the refusal is *not* a normal condition of the worker's employment or
- . a refusal would *not* directly endanger the life, health or safety of another worker, client or the public.

57. The employer also agreed that if a correctional officer was subject to physical limitations or restrictions as a result of illness or injury such a condition would not be a normal condition of the worker's employment. The employer does not dispute, for example, that a correctional officer wearing a cast on a broken leg would be entitled to refuse an assignment to full duties on Unit 4A on health and safety grounds. On that theoretical point the employer's acknowledgment of this limited right to refuse goes further to support Mr. Slack's claim than the Ministry inspector's report of November 10, 1995. The only difference here is that this employer did not believe Mr. Slack when he claimed his injury created limitations on his ability to safely perform all of those duties. Whatever other basis the employer may or may not have had to reach that conclusion, in order to do so it was necessary that they ignore the mandatory medical. The employer ignored the mandatory medical rather than pursue any further investigation of Mr. Slack's medical condition notwithstanding, at best, contradictory medical evidence and at worst, clear medical evidence of specific limitations giving rise to health and safety concerns.

58. Mr. Cardoza testified that he was aware of his obligations as a supervisor to take every precaution reasonable in the circumstances to protect a worker. He further agreed that if an employee advised him of limitations he had a duty to consider those in order to determine the risk before assigning duties. He agreed that if someone was unfit for full duties that could raise a health and safety issue. On the one hand he stated that he did assess the risk in this case. Yet he agreed he had no knowledge of Mr. Slack's limitations. Nor did he inquire. Although he suggested that Mr. Slack did not provide him with a copy of the mandatory medical, neither did he ask to review the document Mr. Slack was holding. I reject any suggestion that Mr. Slack would not have provided Mr. Cardoza the opportunity to review it had interest been expressed.

59. However, later in his cross-examination Mr. Cardoza stated that he saw no necessity to read the mandatory medical because the issue had already been addressed. He stated Mr. Slack's case was not a health and safety issue. When asked to explain he stated the issue of the mandatory medical had been addressed by Mr. Slack and Mr. O'Rourke on November 7 and nothing had changed since then. He agreed that he understood that Mr. Slack was requesting that Mr. Cardoza deal with the limitations in the context of his work assignment.

60. Mr. Cardoza testified that Mr. O'Rourke gave no context or there was no real discussion concerning the instruction that Mr. Slack was to report for full duties on Unit 4A. Yet Mr. Cardoza's notes and his evidence confirm that he was aware of Mr. Rutherford's letter regarding Mr. Slack's WCB status, he believed that a determination as to fitness had already been made, and he was aware that Mr. Slack had worked on November 7 on the auxiliary post. I am satisfied that Mr. O'Rourke told Mr. Cardoza more than simply to assign Mr. Slack to Unit 4A. Otherwise there is no logical explanation for Mr. Cardoza's disinterest in the details of the mandatory medical given his understanding of his responsibilities under the OHSA.

61. A review of Mr. Cardoza's own evidence leads to only one conclusion. He accepted the view of his superior that Mr. Slack had no legitimate health and safety concern and he made no independent inquiry.

62. Mr. Rutherford agreed that he was a supervisor for purposes of the OHSA. He agreed that he had read and understood the restrictions outlined by the mandatory medical. He agreed that Mr. Slack had both the right and duty to report the existence of any hazard he was aware of. He stated he

was aware of his duty to take every precaution reasonable in the circumstances to ensure the safety of workers. He agreed that requiring a C.O. to perform duties where medical restrictions meant the C.O. was unable to carry out those duties without risk of injury was hazardous. He relied on the WCB finding as to fitness here. Yet finally he agreed that the OHSA does not make the WCB responsible for workers' health and safety. He agreed that that responsibility rests with the employer. He also, although reluctantly, agreed that a C.O. with the restrictions outlined in the mandatory medical would be put at risk by various duties involving restraining inmates or lifting inmates.

63. Mr. O'Rourke acknowledged that an employee does not have to use the words "health and safety" to initiate a work refusal under the OHSA. He also stated that he, Mr. Cardoza, and Mr. Conry determined that no health and safety issue was involved here. When asked if that meant no health or safety issue arose where there was conflicting medical evidence regarding restrictions on a C.O.'s fitness for duty, Mr. O'Rourke relied on the WCB decision as the "basis of the decision we made on the information we had". In the next breath he stated that it was "a given" that a supervisor had a duty independent of WCB to take every precaution reasonable in the circumstances to protect a worker.

64. The employer argued that it considered the mandatory medical but accepted the decision of the WCB as to fitness. That explanation does not address the employer's independent obligations under the OHSA and the explanation does not withstand scrutiny in any event. If the employer accepted the WCB's finding it would have subsequently accepted the health and safety issue and would have reversed its position on the suspension once the WCB determined that there was evidence of ongoing total disability after October 29, 1996 which included the period of the suspension. The fact is the employer relied on the WCB findings when it was convenient and not otherwise. It is not my jurisdiction to make any determination with respect to whether by this conduct the various individuals breached their obligations under the OHSA to take every precaution reasonable in the circumstances to protect the worker, but the evidence speaks to the employer's motive in penalizing Mr. Slack.

65. Mr. Conry concluded that Mr. Slack had called the Ministry to distort the issue because he believed that Mr. Slack had been involved in work refusals before, and in meeting with Mr. Cardoza, Mr. Slack had requested a union representative, not a health and safety representative. In Mr. Conry's view Mr. Slack did not indicate there was any refusal based on his medical condition. The length of the suspension was thought necessary as a deterrent. In Mr. Conry's words the supervisor is responsible for health and safety throughout the institution and the employer must remain in control at all times. Mr. Conry asserted the need to comply with direction and pursue recourse after compliance. Mr. Conry agreed that a C.O. who refers to a medical letter citing limitations on his ability to perform duties is raising a health and safety concern should they be required to perform those duties, but only in the first instance. In his view, once considered and an order given, the C.O. should comply with the order.

66. While this view is consistent with an "obey now, grieve later" approach, it runs directly counter to the policy of the OHSA and the various obligations it creates, even in the more restricted regime of a correctional facility. In the usual case the right to refuse unsafe work overrides the traditional "obey now, grieve later" approach. The scheme of the OHSA provides a mechanism for third-party intervention and determination as to whether the worker is required to comply with that order, and where, in a correctional facility, it is asserted that the condition is not a normal condition of the work. That is part of the limited right to refuse work. As I noted in my oral remarks the fact of only a limited right to refuse by employees in a correctional facility surely only enhances the responsibility of the employer and its supervisors to fulfill their obligation to take every precaution reasonable in the circumstances to protect the worker.

67. The issue before me is whether the employer penalized Mr. Slack either because he sought enforcement of the OHSA or its regulations or because he was acting in compliance with those

provisions. Mr. Slack was acting in compliance and was seeking the enforcement of the OHSA when he asserted he was not fit for full duties and requested an accommodation and union representation. To the extent that the employer's representatives had disagreed that his assignment to full duties would constitute a health and safety hazard, Mr. Slack was seeking to challenge that determination prior to being required to engage in the work, and, if necessary, challenge it by way of third-party intervention. By virtue of his actions he engaged the provisions of section 43 of the OHSA and, in light of the contents of the mandatory medical, he had reasonable grounds on which to assert a health and safety risk that was not a normal condition of his work as a C.O.

68. When the employer chose not to accommodate Mr. Slack's stated restrictions pending further medical investigation, and required Mr. Slack to choose between working full duties or refusing, he refused. There can be no doubt that he was asserting a health and safety issue when he repeatedly relied on the contents of the mandatory medical.

69. There was a refusal to work. One can only determine whether that refusal was culpable *after* one answers the question of whether there is a health and safety issue being raised in the context of the refusal to perform that work. Any refusal is an act of insubordination. The issue is whether it is an act that will attract discipline or is it an allowable act protected from discipline because of the overriding concern for the protection of workers' health and safety. When Mr. O'Rourke says that Mr. Slack was not being punished for a refusal because there was no indication that there was a "work refusal" it simply ignores what is actually happening. The employer disciplined Mr. Slack for *refusing* an order to go to his assigned post and perform work. The employer ignored the possibility that the doctor might be right about Mr. Slack's ability to safely perform the assigned work and disciplined Mr. Slack for raising the issue.

70. In order to refuse initially, the worker need only have a subjective belief that his or any other worker's health or safety is at risk. It is the Ministry of Labour inspector's investigation that is designed to assess the reasonableness of that belief. Although making no order, the inspector makes clear his view that the mandatory medical is relevant and in fact, is overriding, as to the assessment of whether it is reasonable to conclude there is a health and safety risk in an assignment to full duties. Regardless of that conclusion, the employer disciplined.

71. Mr. Slack was suspended on both occasions *because* he refused to work. That refusal to work arose as a result of his health and safety concern. In so refusing Mr. Slack was both acting in compliance with the OHSA and seeking its enforcement. In issuing the suspensions the employer penalized Mr. Slack in violation of section 50(1) of the OHSA.

72. Similarly the subsequent memo demanding a return to full duties or a removal from payroll, can only be seen as an attempt to further intimidate or threaten Mr. Slack with employment consequences should he refuse to report for full duties, notwithstanding the employer's clear understanding by this point that Mr. Slack was asserting a health and safety risk to such a return to work, a risk still reasonably supported by medical evidence.

73. In conclusion, I find that the employer violated section 50(1) of the OHSA by suspending Mr. Slack both on November 10, 1995 and on November 27, 1995. I confirm the oral order that Mr. Slack be compensated for any and all wages and benefits lost as a result of the November 27, 1995 suspension, including seniority. In addition, Mr. Slack is to be compensated for any wages and benefits lost, (including seniority) by virtue of the November 10, 1995 suspension. This would include payment for lost premium pay. The employer is directed to remove the letter of suspension dated November 27, 1995 from Mr. Slack's records and is further directed to remove paragraph four from the memo dated December 21, 1995. Finally the employer is directed to post the notice attached to this decision as

Appendix "A" in the workplace for a period of 30 days in a place where it is likely to come to the attention of employees.

74. I will remain seized should the parties have any difficulty implementing this remedial order.

Appendix 'A'
The Labour Relations Act, 1995
NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

THIS NOTICE IS BEING POSTED BY ORDER OF THE ONTARIO LABOUR RELATIONS BOARD FOLLOWING A HEARING IN WHICH THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF THE SOLICITOR GENERAL AND CORRECTIONAL SERVICES) (METROPOLITAN TORONTO WEST DETENTION CENTRE), THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND MR. JAMES SLACK HAD FULL OPPORTUNITY TO CALL EVIDENCE AND MAKE SUBMISSIONS.

THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF THE SOLICITOR GENERAL AND CORRECTIONAL SERVICES) (METROPOLITAN TORONTO WEST DETENTION CENTRE), VIOLATED SECTION 50(1) OF THE OCCUPATIONAL HEALTH AND SAFETY ACT IN SUSPENDING MR. J. SLACK ON NOVEMBER 10 AND NOVEMBER 27, 1995 AND ORDERED FULL COMPENSATION FOR ALL WAGES AND BENEFITS LOST.

CORRECTIONAL OFFICERS ARE DIRECTED TO THE PROVISIONS OF THE OCCUPATIONAL HEALTH AND SAFETY ACT SPECIFICALLY:

50. (1) No employer or person acting on behalf of an employer shall,
- (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 1ST day of MAY, 1998

3215-94-M Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario, Responding Party

Crown Employees Collective Bargaining Act - Employee - Employee Reference - Board finding judges' secretaries to be employees under Crown Employees Collective Bargaining Act

BEFORE: *Mary Ellen Cummings*, Vice-Chair.

DECISION OF THE BOARD; June 4, 1998

1. This is an application that was originally made pursuant to section 108(2) [now 114(2)] of the *Labour Relations Act*. At the outset, a large number of positions were in dispute, but most were resolved through negotiation, leaving only one group of positions/persons in dispute; colloquially called "judges' secretaries" by the parties.

2. By decision dated January 29, 1998, the Board ordered the parties to provide submissions in support of their positions, with the view that it was likely the Board could determine the matter without the need of an oral hearing. The parties provided detailed and thoughtful submissions, and the Board is able to determine the issues on the basis of the submissions.

STATUTORY PROVISIONS

3. This application was made on December 7, 1994. The parties are agreed that at the time, the *Crown Employees Collective Bargaining Act, 1993* (CECBA) defined a number of groups who were excluded from its coverage, and therefore excluded from access to collective bargaining. Among the exclusions was a person:

who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

4. In 1995, CECBA was amended, and the test for exclusion was changed. It now reads:

Other persons who have duties and responsibilities that, in the opinion of the Ontario Labour Relations Board, constitute a conflict of interest with their being members of a bargaining unit.

5. Although the application was filed in 1994, the parties want a resolution that will be relevant today, and so have asked the Board to look at the issue within the context of each statutory exemption definition.

BACKGROUND

6. The parties set out the backdrop of this dispute in some detail, largely in aid of each of their positions about who bears the onus of proof; the applicant, who wants the positions included, or the responding party who wants them to be excluded. There is a significant dispute about which party is seeking to alter the status quo. I have concluded that my decision will not turn on onus, and therefore, it is unnecessary to recount the history of the dispute.

7. The positions and persons at issue do not constitute all the positions of secretaries to the judges in the Province. In fact, a large number of secretaries to judges are in the applicant's bargaining unit. And the parties have also agreed that a few of the judges' secretaries should be excluded. Again, the parties debated the significance of those facts; the applicant argues that the positions at issue are no different than those in the bargaining unit already, and so should be added. The responding party

suggested that the judges' secretaries in the bargaining unit are there in error. Of course, at this late date (many secretaries have been in the unit for years) it is unlikely that anyone could decide which of those opposing views is correct. In any event, since the Board has concluded that the status of the judges' secretaries in this application can be determined without reference to those positions in the bargaining unit, again, it is unnecessary for the Board to try to resolve the differing views of history.

THE ISSUE

8. The positions and persons in issue are as follows:

Court of Appeal

Secretary to the Justices (6 incumbents, 1 of whom is bilingual)

Ontario Court of Justice

Ontario Court (General Division)- Toronto

Judgements Secretary (now abolished)

Secretary to Justices (12 incumbents, 1 of whom is bilingual)

Office of the Chief Justice, Ontario Court (General Division)

Secretary to the Chief Justice (1 incumbent)

Secretary to the Regional Senior Justice (8 incumbents, 1 for each region and 2 bilingual)

Office of the Chief Judge, Ontario Court (Provincial Division)

Secretary to the Associate Chief Judge

Secretary to the Regional Senior Judge (5 incumbents, 1 of whom is bilingual)

9. Counsel for the responding party provided a helpful description of the constitutional backdrop which should, the responding party argues, play a role in the Board's considerations. *The Constitution Act*, divides the responsibilities for the appointment of judges and the operation of the court system between the federal government and the provinces. The federal government appoints the justices to the Court of Appeal to the Ontario Court (General Division), except the Small Claims Court judges. The Province Of Ontario appoints the Small Claims Court judges, and the judges of the Ontario Court (Provincial Division). Significantly, the Province of Ontario is responsible for the operation of all the courts in the Province, including those whose judges are appointed by the Federal Government. Hence, a number of the positions at issue, although employees of the Province, work for judges appointed by the Federal Government.

10. Counsel for the responding party pointed out that the Chief Justices and Senior Regional Judges have general supervision and direction of the court sittings they are mandated to manage. These powers include assigning judges to sittings; assigning cases and other duties to individual judges; determining the workloads of judges and preparing trial lists and controlling courtrooms.

11. Counsel for the responding party conceded that the duties of the positions in issue are not seriously in dispute. He characterized them in brief as "...not just the traditional skills of a secretary

but also the qualities of an executive assistant to assist the respective judges in the carrying out of their functions and responsibilities". It is this link between the judges and the secretaries on which the respondent party most heavily relies in support of its view that the judges' secretaries should be excluded from the bargaining unit. Counsel noted that although the secretaries are employees of the Ministry of the Attorney General, they take direction from the judge to whom they are assigned. The judges are constitutionally and functionally independent from the Crown and the Ministry of the Attorney General and because of the close relationship between the judge and his or her secretary "...the relationship between them becomes one of a position of quasi or de facto employer-employee".

12. Counsel for the responding party emphasized the highly confidential nature of the secretaries' work, because they have access to and prepare draft judgments and "...are also directly involved in the administration of the office of the judge and effectively become an extension of the judge to members of the judiciary, the bar, the government, the public and the press." The secretaries to the Chief Justices, Associate Chief Justices and Regional Chief Justices are said to be privy to even more highly confidential information because they have access to information about the operation and administration of the court system, including information relating to other bargaining unit positions, as a result of discussions about court reform.

13. Counsel for the responding party submitted that the relevant statutory language to be considered is the present language of *CECBA*:

Other persons who have duties and responsibilities that, in the opinion of the Ontario Labour Relations Board, constitute a conflict of interest with their being members of the bargaining unit.

14. Counsel for the responding party submitted that this is a broader test than the Board's traditional test (as replicated in the earlier *CECBA*) of "employed in a confidential capacity in matters relating to labour relations". Counsel argued that the conflict of interest to be considered must extend beyond labour relations. He went on to say that the kinds of conflict the Board is mandated to look at are those where it would be inappropriate for there to be a divided loyalty for the person in the position "...between the interests of a bargaining agent and the interests of another body". In this case, it is submitted that to permit the secretaries to be in the bargaining unit would subject them to being in conflict between the loyalty owed to the bargaining agent and the loyalty owed to the judge as their de facto employer. This conflict could arise, it is pointed out, if the judges' secretaries had to prepare decisions in cases where one of the litigants was the bargaining agent. Counsel argued that concerns about an appearance of bias extended to the judges' secretaries as an extension of the judge's office.

15. The second conflict outlined is that judges' secretaries, like judges and the courts, in general, must be and be seen to be independent, and "...any question of the loyalty of the individuals directly involved in these matters is simply unacceptable".

16. The responding party is also concerned about the implications of including the judges' secretaries in the large Office Administration Bargaining Unit of the applicant. The responding party submits that the terms and conditions of the collective agreement may not be appropriate for the administration of the courts. Some of the concerns raised are the possibility that in a downsizing, a senior employee could bump the Chief Justice's secretary "despite the long relationship with that judge"; that the essential services agreement between the responding party and the applicant may not provide for continued secretarial services to the Chief Justice during a strike; and "an agreement between the Crown and the bargaining agent may require mandatory unpaid leave by all bargaining unit staff to the detriment of the operation of the courts".

17. Counsel summarized his arguments as follows:

It is acknowledged that it is the constitutional responsibility of the Crown to provide for the administration of justice within the province in a manner that complies with the requirements of

administrative independence for the judiciary. It is submitted that this constitutional obligation is difficult enough to achieve without the additional complications imposed by the restrictions of a collective agreement. The imposition of the membership in a bargaining unit, particularly one the such a size and general nature as OPSEU, does not allow for the sufficient certainty regarding the terms and conditions of employment of the judges' secretaries to ensure that the Offices of the Chief Justice and the Regional Senior Justices are able to operate in an appropriate manner. Consequently, it is submitted that it is not appropriate for these judges' secretaries to be members of a bargaining unit.

18. The applicant submitted that the judges' secretaries performed traditional secretarial duties, with no involvement in labour relations, in part because the judges they serve are independent of the Crown, and do not participate in is labour relations. The applicant pointed out that access to confidential information, or the requirement to work with confidential information is not a reason to exclude, where the confidential information does not relate to labour relations. Counsel for the applicant cited the Board's decision in *York University* [1994] OLRB Rep. Jan. 96.

19. Turning to the issue of whether there is a conflict of interest in the judges' secretaries being members of a bargaining unit, the applicant indicated that it could envision no conflict that met that test in this case. It pointed out that while it is true that the applicant is a party before the courts, from time to time, the responding party is a party before the court just as often, so it is inappropriate only to focus on the applicant.

20. The applicant pointed out that the fundamental flaw in the responding party's argument is its characterization of the relationship between the judge and his or her secretary as de facto employer/employee, when there can be no question that the secretaries are employed by the Crown, not the judge. Therefore any alleged conflicts of interest between the judge and his secretary are immaterial, because they are not conflicts between the employer and employee; the only type of conflict that is relevant.

DECISION

21. As a starting point, it is important to remember that the decision to exclude a person from a bargaining unit denies that person the opportunity to collectively bargain for his or her wages and working conditions, and to participate in the lawful activities of the trade union. Over the years the Legislature has, in some way, recognized that exclusion from the bargaining unit denies important rights, because the categories of persons excluded has consistently been fairly narrow. The Board, similarly, has recognized that the loss of the right to collectively bargain is a real loss, and has appropriately narrowly construed the exceptions.

22. I have reviewed the job description for the positions and persons in questions, which both parties agree accurately reflect the content of the positions. While there is some variation among them, they generally describe traditional secretarial duties of preparing and receiving correspondence; typing draft decisions; managing the judges' correspondence; maintaining the judges' appointment diaries; scheduling meetings and other events; greeting visitors; answering and screening calls; filing materials; ensuring office, equipment and supplies are up to date; gathering and preparing background materials for the judges; reminding the justices of matters of priority; taking minutes at meetings; and assisting the Chief Justices and Regional Justices in their responsibilities for directing the workload of the other judges. It is also evident from the job descriptions that the secretaries are required to perform at a high level of competence, and act with the utmost discretion, and with due regard to the confidentiality of the materials with which they work, particularly draft decisions.

23. No one is alleging that any of the judges' secretaries exercise managerial functions, so under the pre-1994 *CECBA* language, the only possible grounds for exclusion is because the judges' secretaries are "employed in a confidential capacity in matters relating to labour relations." There is, though,

nothing in the job descriptions (or submissions of counsel for the responding party) that even remotely suggests the judges' secretaries "are employed in a confidential capacity in matters relating to labour relations". The judges' secretaries have nothing to do with labour relations. Therefore, under the test enunciated in *CECBA* at the time this application was made, there is no doubt that all of the persons in the secretarial positions were persons to whom *CECBA* applied and entitled to participate in collective bargaining.

24. The more interesting question is whether the duties and responsibilities of the judges' secretaries "...constitute a conflict of interest with their being members of the bargaining unit", as the relevant *CECBA* exclusion is now worded.

25. I agree that the new language is broader than its predecessor and allows the Board to look at conflict of interest in a wider context. However, the Board may not consider any and all conflict of interest, but only those relating to being "a member of the bargaining unit".

26. Let me begin with those alleged conflicts that I have concluded are inappropriate for the Board to consider. The responding party suggests that the terms of its collective agreement with the applicant are inappropriate for the judges' secretaries because they could result in bumping; entitlements to leaves of absence; and disruption of work during a strike. However, the responding party is one of the parties to that agreement, and presumably, can seek to negotiate terms that would address those concerns. But more fundamentally, I am not satisfied that the Legislature intended the Board to consider allegedly onerous collective agreement provisions as a potential conflict of interest. To go down that road is to conclude that only when the terms of the agreement are advantageous to the employer, is there no conflict of interest. Furthermore, I am not convinced that concerns about the appropriateness of the collective agreement is encompassed in the statutory definition which relates conflict of interest "to being members of a bargaining unit".

27. I reject the responding party's assertion that the close relationship between judges and their secretaries makes the judges the de facto employer, and that membership in a bargaining unit threatens the integrity of that relationship. First, I note that the job description of all the secretaries indicate that they do not report to the judge they serve: the secretaries report to a Regional Coordinator; Finance and Administration Manager; Executive Legal Officer; Manager/Office and Administration support; or an Administrative Assistant to Regional Senior Judge, suggesting that the "de facto employer" concept may not be factually (much less legally) sustainable. Second, the concerns the responding party has outlined, that is that the loyalty of the secretaries to the judges would be compromised if the secretaries were included in a bargaining unit, has not been substantiated. The responding party has essentially asserted that in the administration of justice, secretaries to judges are extensions of the judge, and so must have and be seen to have the same independence and freedom from an appearance of bias as the judge who hears and decides the case. The responding party's submissions seek to extend the cloak of justice very widely.

28. Counsel for the responding party relied in part on the decision of Supreme Court of Canada in *Valente v. the Queen*, 1985, 24 D.L.R. (4th) 161. The Court held that judicial control over the assignment of judges, sittings of the court and court lists, as well as the related matters of allocations of court rooms "...and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or 'collective' independence". But even if the Board were to accept that the judges' secretaries carry out some of these functions, the independence at issue is *Valente* is independence from Government, which is not the issue before me. Put another way, even if the judges' secretaries were employees of an independent judiciary rather than the Crown, it does not follow that the secretaries' membership in a bargaining unit would create a conflict with the independence of the judiciary.

29. There is no doubt that secretaries to judges must work with the utmost discretion and appreciation of the confidentiality of the materials with which they work. But that requirement is no different from the obligations placed on any employee who works for or with a senior member of government or a private corporation, or an adjudicator at an administrative tribunal. The requirement to act with discretion does not, however, place the judges' secretaries on a level where they must enjoy an independence and absence of an appearance of bias approaching that of the justices they serve. Litigants are concerned about the independence of the person who hears and decides their case, not the union activities of the person who types the decision.

30. I also agree with the submission of counsel for the applicant that the conflicts the responding party has identified all relate to the relationship between the judge and his or her secretary. The responding party has not identified any conflicts between the secretaries and their actual employer, the Crown. Those are the kinds of conflicts that the *CECBA* exclusion is concerned with; conflicts that may divide the loyalty of a person between her employer and the bargaining agent. It is true that judges' secretaries may occasionally prepare a decision in which the applicant is the litigant. I am not convinced that this is a significant challenge to the loyalty of the secretaries to their employer. Nor would it be a regular part of their employment. I expect that the secretaries more often deal with litigation in which their employer, the Crown, is a party.

31. In summary, I do not accept the assertion that the judges' secretaries are de facto employees of the judges they serve. More important, I do not accept the argument that judges' secretaries are extension of the judges, and must reflect the same degree of independence. I have also concluded that the responding party's concerns about the appropriateness of the terms of the collective agreement which would presumably cover these employees is an inappropriate consideration, where the statutory language requires the Board to consider only conflicts of interest in being a member of a bargaining unit.

32. In conclusion, the judges' secretaries I have considered are employees under *CECBA*, and thus entitled to participate in collective bargaining.

3269-97-OH Ali Abdulkadir, Applicant v. **Dough Delight Inc.**, Responding Party v. Bakery, Confectionery and Tobacco Workers' International Union, Local 181, Intervenor

Discharge - Health and Safety - Employee alleging that he was discharged following car accident in reprisal for his efforts to protect his health by seeking income replacement, through short term disability benefits, rather than attend at work while still injured with the risk that he might aggravate his injury - Employee also alleging that discharge was in reprisal for anticipated request that employee would make for accommodation at work once he was well enough to return to work - Application dismissed for failure to make out prima facie case - Alternatively, Board declining to inquire into application on ground that nothing pleaded raised issue invoking core concern of Occupational Health and Safety Act

BEFORE: *Robert Herman*, Alternate Chair.

DECISION OF THE BOARD; June 18, 1998

1. This is an application filed pursuant to the provisions of section 50 of the *Occupational Health and Safety Act* (the "OHSA"). This decision considers whether the application ought to be dismissed without a hearing.

2. The provisions of subsections 50(1), (2), (3) and (7) of that Act read as follows:

50. (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 91 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

• • •

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

• • •

3. Under this Act, a worker who asserts that he or she has acted in compliance with the OHSA or the regulations or an order made thereunder, or who has sought enforcement of that Act or the regulations made thereunder, or who has given evidence in a proceeding in respect of the enforcement of that Act or the regulations or in an inquest under the *Coroners Act* can complain to the Ontario Labour Relations Board. However, the statute does not create a general unrestricted right to complain to the Board where one asserts injury or threat to health in a work setting. Nor does section 50 entitle the Board to consider whether there have been breaches of other sections of the OHSA. A complaint must be founded upon an allegation that an employer, or a person acting on behalf of the employer, has in some manner imposed a penalty upon the applicant or intimidated or coerced that worker *because* the worker has been acting in the prescribed manner.

4. In light of the ambit of the Board's jurisdiction, I turn now to consider the facts, as pleaded, or as otherwise agreed to in the filed material.

5. The applicant, Mr. Abdulkadir, began working for the responding party, Dough Delight Limited ("Dough Delight"), around the 27th day of June, 1990. By April 15, 1997, his last day of work, he was working as a Mixer Lead Hand on the day shift.

6. The next day, April 16, 1997, he phoned the company sometime after midnight and spoke to his supervisor, advising her that he would be off work for two weeks.

7. While off work, on April 20, 1997, the applicant was in a car accident. The next day, April 21, 1997, Mr. Abdulkadir called his supervisor again, informing her of the car accident and advising her that he was not aware of when he would be well enough to return to work. Approximately one week later, the applicant attended at the company plant, to pick up his paycheque. While there, he advised one of his supervisors about his physical condition, and the fact that he was still unable to return to work.

8. During the first week of May, 1997, the applicant forwarded an accident report, prepared by the police, to the company's Human Resources Department, and at the same time requested from his employer his vacation pay and a claim form for short term disability benefits. Three days after requesting this claim form, Mr. Abdulkadir submitted the completed form to the company. At the same time that he submitted this benefits claim form, he was advised by the Payroll Administrator for the company that she understood that the applicant's employment had already been terminated by the company, prior to when he had come in earlier and picked up the claims form. He was advised to speak to someone in the Human Resources Department.

9. The next day, the applicant returned to the plant and spoke to someone in the Human Resources Department, when he was again advised that he had already been terminated.

10. By letter from the company dated May 15, 1997, the applicant was advised that he would be deemed to have abandoned his position unless the company heard from him by May 20, 1997. However, this letter was hand-delivered to the applicant on May 23, 1997, and not otherwise received by Mr. Abdulkadir prior to that date.

11. After he received this letter, and on the same day, the applicant went to speak to his union, to advise it that he had been terminated. The union told the applicant that it would file a grievance on his behalf, challenging his termination. Also on May 23rd, the company's Payroll Administrator certified to the company insurer that short term disability compensation was available to the applicant, because of his car accident, as well as income continuation benefits, and some medical rehabilitation or attendant care benefits. The Payroll Administrator also advised the insurer that the applicant had not as yet returned to work (the application as filed asserted that the Payroll Administrator advised the insurer that the applicant *had* returned to work by then (see paragraph 14 of Schedule A to the Application), but in the subsequently filed submissions of March 25, 1998, at paragraph 9, the assertion is that the insurer was advised that the applicant had *not* yet returned to work).

12. Some time after June 3, 1997 the applicant was sent his Employment Canada Record of Employment, which stated that the applicant had failed to report to work within three days, he had failed to follow the call-in procedure, and that he was deemed to have abandoned his position. The Record of Employment also indicated that his final pay period ended May 31, 1997.

13. The union subsequently filed a grievance, alleging the unjust dismissal of the applicant. The company responded, denying the grievance. On September 16, 1997, a grievance meeting was held, and on September 23, 1997, the responding company offered to rehire the applicant to the same position, but without seniority.

14. The applicant rejected this offer, and the company subsequently offered the applicant a different position, as a production worker rather than a mixer, but without loss of seniority. The applicant also rejected this offer.

15. The applicant disputes that he did not follow the company's call-in procedures, that he did not report as required on April 16, 1997, or that he at any time abandoned his position with the company. He asserts that the decision to terminate him was taken after the applicant had advised the company that he had been in an accident and would be seeking short term disability benefits. Further, he asserts, because of the nature of the injury he suffered, it would have been and was apparent to the employer that the applicant would have to be accommodated in his employment, upon his return. In this respect, the applicant asserts that the company terminated the applicant in reprisal for his efforts to protect his health by seeking income replacement through short term disability benefits, rather than attend at work while still injured, with the risk that he might aggravate his health, and in reprisal for the anticipated or expected request that the applicant would make for accommodation at work, once he was well enough to return to work.

16. More specifically, the applicant asserts that sections 25, 26, 27, and 28 of the OHSA are related to the application. As set out in the application, he asserts that the following reprisal conduct was engaged in by employer:

(a) the employer pretended that the applicant had not advised it of his absence from work, as a result of the injury, even though the applicant clearly had done so;

(b) the employer refused to give the applicant his vacation pay when he was entitled to receive it;

(c) the employer fired the applicant prior to the applicant's ability to file his short term disability claim, and refused to forward the appropriate disability forms from the applicant to the insurer;

(d) through subterfuge and deceit, the employer intentionally gave the applicant on May 23, 1997 a letter requiring him to return to work on May 20, 1997, so that it would have been impossible for the applicant to fulfill that condition;

(e) the employer wilfully frustrated the applicant's ability to obtain continuation benefits, medical rehabilitation, and attendant care benefits through the short term disability insurers;

(f) the employer falsified the Employment Canada Record of Employment, insofar as it alleged that the applicant had failed to report to work within three days and failed to follow the call-in procedure, when the employer knew that the applicant had done so;

(g) the employer attempted to penalize the applicant by seeking to rehire him only without seniority, after it had already wrongly dismissed him in violation of the collective agreement;

(h) the employer attempted to penalize the applicant by offering to accept him as a production worker rather than in his former position, as a mixer.

17. Finally, the applicant alleges that the above noted conduct was in violation of section 50 of the OHSA "and resulted from the Applicant's efforts to seek to protect his health by not returning to work while he was unhealthy and unable to do the work and when to have done so would have constituted a hazard to his health and safety as well as by his efforts to seek benefits generally available to disabled employees who were for health reasons unable to return to work. The employer throughout was aware of the actual events set forth in this application as related by the applicant with respect to his dealings with the company but chose to either ignore or misrepresent them to the worker and to his union in its dealings concerning him for purposes of reprisal and financial gain without due regard to the health and safety of the employee and a breach of its duty to take all reasonable measures necessary in order to secure the safety of the workplace and the health of the employee".

18. In its Response, the responding employer asked that the application be dismissed on the grounds that it was untimely, that it did not disclose a *prima facie* case, that it was more appropriately dealt with under other legislation, and because there had been no violation of the OHSA. The company also asked that an order be made against the applicant and/or his (legal agent) for solicitor and client costs, as the application was frivolous, vexatious, and made in bad faith.

19. The Board then issued a decision providing further opportunity to the parties to file written submissions on the issues of whether there was a *prima facie* case, and whether the Board ought to exercise its discretion and decline to inquire further. In response to this decision, the applicant further asserted that the company had a policy of terminating employees who were ill or who had suffered accidents because of the added financial liability that such employees would represent. The applicant asserted that such policy constituted an effort to intimidate and punish the applicant for refusing to endanger his health and safety by returning to work prematurely.

20. The Board turns now to consider whether the application as filed discloses a *prima facie* case, and even if it does, whether it is appropriate in the exercise of the Board's discretion to decline to inquire further into the complaint.

21. There have in recent years been an increasing number of complaints filed which allege breaches of section 50(1) of the OHSA, which are based upon factual assertions that do not allege mechanical or physical dangers in the workplace. These complaints have derived from a variety of contexts where there exist legitimate workplace concerns, such as sexual harassment (*Meridian Magnesium Products Limited*, [1996] OLRB Rep. Dec. 964), racial discrimination (*Toronto Board of Education*, [1997] OLRB Rep. May 541), stress and anxiety (*Corporation of the City of Scarborough*, Board File No. 0656-97-OH, December 15, 1997, unreported) and so on.

22. The Board now has a developing jurisprudence which has addressed some of the issues that have arisen in those applications, some of which also arise here. In *Meridian Magnesium Products* (above), the Chair of the Board at some considerable length considered the appropriateness of the Board inquiring into the complaint in that matter, which was a complaint at its core about sexual harassment in the workplace, and he considered whether the Board ought to exercise its discretion to not inquire into the complaint. As the Board there wrote:

73. The *Human Rights Code* creates a framework of rights and freedoms of wide-ranging application and quasi-constitutional status (see *Institutional Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Zurich Insurance Co. v. Ontario Human Rights Commission*, [1992] 2 S.C.R. 145; *Zurich Insurance Co. v. Ontario Human Rights Commission*, [1992] 2 S.C.R. 321; and *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103). Its primary thrust is the elimination of discrimination on a number of stipulated grounds (race, creed, colour, ethnic origin, age, sex, marital status, etc.). However, it is important to note that the *Code* is also an employment statute, regulating various aspects of the employer-employee relationship - just like the *Labour Relations Act*, the *Occupational Health and Safety Act*, the *Employment Standards Act*, the *Workers' Compensation Act*, etc. The *Code* is part of the fabric of employment law, and among its elements, are several provisions prohibiting gender discrimination and harassment in the workplace. Sections 5 and 7 of the *Code* read, in part, as follows:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

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7. (2) *Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.*

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

74. Sections 8 and 9 of the Code prohibit the infringement of these enumerated rights, *as well as* any “reprisals” because someone has sought to enforce them:

8. *Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.*

9. *No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.*

75. The Code protects an individual from harassment and discrimination in employment on any of the prohibited grounds. The Code also protects an individual from reprisals for “claiming” or seeking to enforce the rights that are spelled out in the Code. “Harassment” and “gender discrimination” receive specific, but separate legislative treatment. So does the question of “reprisals”. And to complete the picture, section 11 of the Code addresses what might be described as “constructive” discrimination - features of the work relationship which are not *intended* to discriminate, but which nevertheless have an exclusionary or discriminatory impact.

76. The “sexual harassment” provision [now section 7 of the Code] was added to the Code in 1981 - presumably because there was some question about the ambit of the existing gender discrimination provisions, or because it was thought that sexual harassment required separate legislative consideration, or both. But in any event, there is really no doubt that gender discrimination, sexual harassment, and reprisals are all dealt with quite explicitly (albeit separately) in the *Ontario Human Rights Code*. Accordingly, whether or not Ms. Musty has a claim under the OHSA, it is clear that she can complain under the Code about gender discrimination and harassment, and she can complain as well, if she has been the victim of reprisals for asserting rights protected by the Code. The substantive violation and the reprisal each provide an independent ground for complaint.

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77. The *Occupational Health and Safety Act* has no similar provisions dealing with harassment or discrimination. If sexual harassment and gender discrimination are covered by the OHSA at all, it is because of general language involving workplace hazards, rather than specific provisions dealing with those issues. Nor is there anything in the OHSA that deals specifically with workplace stress, threats to mental health, mental disability or mental distress - all of which are part and parcel of Ms. Musty’s complaint.

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78. As its title indicates, the purpose of the *Occupational Health and Safety Act* is to promote the health and safety of workers. It does that by prescribing safety standards (often by regulation), and by establishing mechanisms to identify and rectify situations that may be a source of danger.

79. The legislative antecedents of the OHSA have been canvassed in *Inco Metals Co.*, [1980] OLRB Rep. July 981, and will not be repeated here. It suffices to say that the OHSA creates new rights, and imposes important responsibilities, on everyone in the workplace. The Act creates what might

be described as a system of “internal responsibility”, that is supplemented by prescribed standards, by external inspection, by direct enforcement of statutory requirements, by quasi-criminal sanctions and by legislated protection from reprisal for seeking to enforce statutory rights. It envisages a regulatory role for the Ministry of Labour, and, to a lesser degree, the Ontario Labour Relations Board.

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92. The administration of the Code is given over to the Ontario Human Rights Commission, whose functions are spelled out in section 29:

29. It is the function of the Commission,

- (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
- (b) to promote an understanding and acceptance of and compliance with this Act;

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- (f) to inquire into incidents of and conditions leading or tending to lead to tension or conflict based upon identification by a prohibited ground of discrimination and take appropriate action to eliminate the source of tension or conflict;
- (g) to initiate investigations into problems based upon identification by a prohibited ground of discrimination that may arise in a community, and encourage and co-ordinate plans, programs and activities to reduce or prevent such problems;
- (h) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;
- (i) to enforce this Act and orders of the board of inquiry;

As will be seen, the Commission’s role under the Code is much broader than merely enforcing the Code or rectifying alleged violations. It has a more panoramic mandate, that includes investigations and programs to eliminate the sources of discrimination.

93. The Code envisages that the Commission will take a more holistic view - which does not exclude litigation of specific complaints, but may not be limited to that approach either, and could, for example, include mediation, education, and training initiatives. The Commission has a public responsibility to protect and promote the rights enumerated in the Code. And unlike this Board under the OHSA, the Code begins with a broad statement of statutory purpose, which helps shape the interpretation of that statute, as well as the role of the Commission.

94. However, the Code also includes a mechanism for enforcement through litigation of specific complaints, and provides for quasi-criminal penalties as well.

95. Where someone believes that a right under the Code has been infringed, s/he may file a complaint with the Commission (which may also initiate a complaint on its own motion, or upon the request of any person). Upon receipt of that complaint, the Commission is obliged to investigate and endeavour to effect a settlement. The Commission has wide powers of investigation, and the obstruction of such investigation is itself an offence under the Code. The Commission carries the complaint on the complainant’s behalf, and has to decide what mix of litigation or other responses (or proposed settlement terms) are consistent with the *public and private* interests involved.

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100. However, in keeping with the specific treatment and special character of harassment cases, the Code specifically contemplates *additional* remedies for harassment situations, as well as special obligations for those in a position to make sure that the harassment is not repeated. Indeed, a board of inquiry has a continuing mandate to monitor the situation. Section 41(2) of the Code reads this way:

41. (2) Where the board of inquiry makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2(2) or subsection 5(2) or conduct under section 7, and the board finds that a person who is a party to the proceeding,

- (a) knew or was in possession of knowledge from which the person ought to have known of the infringement; and
- (b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it, *the board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 36(2), request the board to re-convene and if the board finds that a person who is a party to the proceeding,*
- (c) knew or was in possession of knowledge from which the person ought to have known of the repetition of infringement; and
- (d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it, the board may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.

(emphasis added)

The term “sanctions” in item (d) suggests that a board of inquiry has the power to require an employer to punish offenders - who, of course, are parties to the proceeding, in their own right, under section 39(2).

23. After sketching out the differences between the two pieces of legislation in question, the Board continued to express the view that matters of the nature there in question were more appropriately dealt with outside the confines of the OHSA:

125. I have been somewhat tentative in the preceding paragraphs, because although all of these propositions are certainly “arguable”, sexual harassment does not fit very well into the OHSA scheme - quite apart from the potential overlap with the investigatory and enforcement processes set out in the Code. Nor is there much reason to believe that issues of race, creed, colour (etc.) - which admittedly can cause tension or distress in the workplace - were ever intended to be dealt with under the OHSA (in addition to, or instead of the *Ontario Human Rights Code*). In fact, the specificity of the Code, the specific addition of harassment in 1981, and the specific remedial prescriptions for harassment cases, all suggest the opposite conclusion.

126. Sexual (or racial) harassment in the workplace may fit a literal or even a purposive reading of the term “hazard” in the OHSA, but the OHSA does not deal very clearly with problems of this kind, and the existence of the very specific provisions in the Code, suggests that the OHSA was not intended to do so. For as I have already noted, the Code is also an employment statute that regulates behaviour in the workplace, and prohibits both harassment and reprisals. Moreover, the powers of the Commission and a board of inquiry permit a focused or nuanced response to these specifically identified workplace problems. This Board has no monopoly in the area of employment regulation, or even in the area of employment reprisals.

127. I shall have more to say about that below. At this point, I merely note that within the OHSA itself, the emphasis seems to be on *physical* threats to a worker’s well-being, which may suggest

that open-ended words like “health”, “safety” or “hazard” should be construed in that light. For as the Court observed in *Colquhoun v. Brooks* (1889), 14 A.C. 493:

It is beyond dispute ... that we are entitled and indeed bound when constructing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act.

From this perspective, it might be said that general words like “hazard”, “health”, “danger”, “precaution” should be interpreted in light of the way health and safety problems are considered elsewhere in the statute, and are limited to physical risks or hazards.

128. The provisions of the OHSA focus primarily - if not exclusively - on *physical* hazards in the workplace: on machines, devices, things, equipment, protective devices, building structures, dangerous biological or physical agents, and so on. (See, for example, sections 8, 9, and 25, and the powers of an inspector under sections 54-60). Even the right to refuse unsafe work under section 43 focuses on the “equipment, machine, device or thing the worker is to use” or the “*physical* condition of the workplace”. The physical element is either implicit in the hazard specifically identified, or has been added by the Legislature, as in section 43 which gives an employee the right to refuse to work when the situation is unsafe. If section 43 had been intended to cover *any condition* in the workplace, the word “physical” would not have been necessary.

129. Not only does the OHSA appear to be concerned with physical threats of one kind or another, but the provisions of the OHSA do not seem to focus at all on “dangerous people”, except in relation to physical activities or the dangerous operation of equipment. Thus, section 28(2) of the OHSA provides:

28. (2) No worker shall,

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- (b) use or operate any equipment, machine, device or thing or *work in a manner that may endanger himself, herself or any other worker*; or
- (c) engage in any *prank*, contest, feat of strength, unnecessary running or *rough* and boisterous *conduct*.

Even *Barmaid's Arms*, [1995] OLRB Rep. March 229, a case upon which the complainant relies, involved a *physical* threat to the employee in question.

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156. The modern workplace is now subject to an array of arguably overlapping statutes, which, in turn, can foster multiple litigation in different forums arising out of the same basic work setting. The instant case is a classic example, involving (among other things) a request for compensation in the Courts, and broadly similar or related relief under three separate statutes (Workers' Compensation, the OHSA, the Code) administered by several different statutory agencies and tribunals (the WCB and WCAT, the Human Rights Commission and a board of enquiry, and the Ontario Labour Relations Board). And if the OHSA applies generally, as Ms. Musty says it does, one could add inspectors from the Ministry of Labour and the adjudication/appeal procedures under the OHSA as well.

157. This checkerboard of statutory rights and remedies is not only a recipe for inconsistent results as each agency or tribunal sifts through the facts from its own perspective, but in the circumstances, I do not think that it is inappropriate to consider the public and private costs of an exercise in which several statutory agencies are all being called upon to look at, and potentially litigate about, the same behaviour. On the contrary, it appears to me to be entirely appropriate that before plunging ahead, one tribunal should take into account what another tribunal is doing or was designed to do.

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160. I do not think that it is necessary to multiply the examples. The fact is, what this case is really about is sexual harassment in the workplace and what is necessary to remedy that situation - both for Ms. Musty herself, and for other employees working in the allegedly "poisoned work environment". This is not an area in which this Board can claim any specific expertise, and it is debatable whether there is a foundation for intervention under the OHSA - and then only if the circumstances fit the narrow, no-reprisal provisions of section 50. And if a breach of section 50 were established, there is no reason to believe that this Board's remedial authority is as broad as that of the Commission or a board of inquiry - or that this Board could even impose the range of remedies that Meridian has already agreed to. This Board has never undertaken its own investigations, organized or imposed anti-harassment programs, supervised a workplace on a continuous basis, inserted a "just cause" clause into a collective agreement or contract of employment, invested a health and safety committee with quasi-judicial powers to adjudicate discrimination complaints, ordered an employer to punish a supervisor, or even given significant damages for mental distress.

161. Whether or not these particular remedies are available under the Code in this case, I think that it is clear that the Commission and/or a board of inquiry are better situated to deal with these problems than this Board is under section 50 of the *Occupational Health and Safety Act*. Indeed, since Meridian says that it is trying to get the grievor back to work, and the grievor says that it is first necessary to rectify the poisoned work environment, the central issue in this case is not reprisal or reinstatement but rather remedying harassment and gender discrimination - something that falls squarely within the central jurisdiction of the Commission under the Code. The situation in this case is not unlike that before the Board in *David Gazit v. Ontario Public Service Employees' Union and George Brown College*, (Board Files 0616-95-U and 0617-95-U), where the Board declined to enquire into the complaint and observed:

... All of Mr. Gazit's concerns are, at root, his assertion that he has been subjected to an ongoing pattern of discriminatory treatment by reason of his age, creed, and sex. His concern about a "poisoned work environment" all stem for what he has consistently asserted are human rights violations.... Even assuming that the withdrawal of [the Human Rights complaints] might be a factor in my determination, the complaints were extant when the issue was put before me. Mr. Gazit is forum shopping. It is inappropriate, and an enormous waste of public and private resources. All of the concerns that Mr. Gazit has raised are before the Human Rights Commission. The remedies he seeks are also more within the ambit of the Commission's usual and often broader, remedial work.

24. In *Toronto Board of Education* (above), although the Board there dealt with a different issue, a complaint of alleged harassment or discrimination on the basis of race, the Board came to a similar conclusion. As the Board wrote:

50. The Board's decisions in both *Meridian* and *Lyndhurst* stand for the proposition that sexual harassment as hazard or reprisal conduct is arguably within the Board's jurisdiction when forming the basis of an application pursuant to section 50(2) of the Act. In *Meridian*, the parties raised the issue of deferring to the Commission and the Board decided that if the real issue is one of human rights, then there should be deferral. The majority decision in *Lyndhurst* does not address this point.

51. In our view, the reasoning in *Meridian* is incontrovertible. Unlike the respondent, we do not read *Lyndhurst* as being inconsistent with *Meridian*.

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57. Having regard to the provisions of the Code referred to above, the analysis in *Meridian* in our view applies equally to applications under section 50(2) of the OHSA which deal with issues of harassment and discrimination on the basis of race. There can be little doubt that the Legislature clearly intended the Commission to deal with complaints of harassment and discrimination in the workplace on the basis of race, including reprisal complaints.

Characterization

58. In *Meridian*, the question posed was "what is this case really about?". We now deal with how this matter should be characterized.

25. As in *Meridian Magnesium Products* (above), the Board in that case declined to inquire further into the complaint.

26. In the *Corporation of the City of Scarborough* (above), the Board wrote as follows:

28. However, I am not satisfied that the complaint makes out a *prima facie* case of a breach of subsection 50(1) of the *Occupational Health and Safety Act*.

29. The applicant did not specifically identify any health and safety concerns, or give any indication that she was seeking to enforce her rights under the *Occupational Health and Safety Act* or Regulations until she filed this complaint. Nor did she conduct herself in a way such that it could be said that she was in fact exercising such rights even though she did not expressly identify them or perhaps even know of such rights.

30. As Mr. Kopyto points out, a worker need not utter any particular words or take any particular steps in order to be entitled to the protection of the Act or Regulations. Indeed, a worker need not even be aware of the Act or Regulations in order to obtain their protection. However, a worker must allege a *prima facie* connection between conduct which can reasonably be said to constitute acting in compliance with or seeking enforcement of the Act or Regulations (whether or not she was aware that was what she was doing), and employer conduct which she alleges was and could reasonably be said to constitute a reprisal for doing so. That is, a worker must in fact be exercising a right under the *Occupational Health and Safety Act* (whether or not she knows that is what she is doing), and an employer must have in effect penalized her for doing so. The worker must therefore do *something* to indicate the existence of a health and safety problem, even if she does not realize that what she is doing is invoking the Act. A worker who “suffers in silence” will have difficulty making a sustainable assertion that something an employer did was in response to an attempt to comply with or seek enforcement of the *Occupational Health and Safety Act*.

31. It has been suggested that in order for a worker to obtain the protection of section 50, it is sufficient for a worker to have an honest reasonable belief that s/he is acting in compliance with or exercising a right under the Act or regulations. That is the case, but only to a point.

32. For example, subsection 43(3) of the Act provides that a worker may refuse to work where he or she has reason to believe that working would endanger him or herself, or another worker. If a worker has an honest and reasonable belief in this respect, subsection 50(1) protects him/her from employer reprisals for exercising his/her subsection 43(3) rights.

33. However, subsection 50(1) does not contain language analogous to subsection 43(3). It protects workers who have acted in compliance with or sought enforcement of the Act or regulations. This includes workers who refuse to work because they have “reason to believe” their health and safety or that of other workers was in jeopardy. It does not include workers who believe, however honestly and reasonably, that they are acting in compliance with (or perhaps seeking enforcement of) the Act or regulations when that is not in fact the case; as, for example in the case of a worker who acts in a manner which s/he honestly believes is in compliance with the Act but that is not in fact the case. A worker who acts in ignorance of the Act or regulations is no more entitled to the protection of subsection 50(1) than an employer is entitled to plead ignorance of the Act or regulations in defence of a complaint under section 50. This sort of honest but mistaken belief of a worker may be relevant, if at all, to the Board’s considerations under subsection 50(7) (a provision which has no application unless there is first a *prima facie* case of a breach of ss. 50(1)).

34. It is important to understand the Board’s role under the *Occupational Health and Safety Act*, and, more specifically, the jurisdiction which the Board has under section 50 of the Act. This is a jurisdiction which has to be placed and understood in context.

35. In the recent case of *Meridian Magnesium Products Limited*, [1996] OLRB Rep. Nov./Dec. 964 (at paragraphs 73 to 161), the Chair of the Board undertook an analysis of the Board’s jurisdiction under the *Occupational Health and Safety Act*, and specifically how that jurisdiction intersects with the Ontario *Human Rights Code* and the rights and enforcement mechanism under that legislation. I respectfully agree with the analysis in *Meridian, supra*.

36. As the Board observed in *Meridian, supra*, the legislative fabric of employment law in Ontario consists of numerous statutes. The *Occupational Health and Safety Act* is one of those statutes. In section 50 of the *Occupational Health and Safety Act*, the Legislature has chosen to make use of the expertise the Board has developed from dealing with unfair labour practice complaints under its home statute, the *Labour Relations Act, 1995*, by giving the Board a "reprisal jurisdiction"; that is, the authority to deal with complaints by workers that they have suffered reprisals from employers for acting in compliance with or seeking enforcement of the *Occupational Health and Safety Act* or Regulations. (This is similar to the reprisal jurisdiction the Board has under other non-labour relations statutes, such as the *Environmental Protection Act* and the *Smoking in the Workplace Act*).

37. The statutes which appear to bear most directly upon the applicant's allegations in this case are the *Occupational Health and Safety Act*, the *Workers' Compensation Act*, and the *Human Rights Code*. These statutes form somewhat of a health and safety patchwork within the legislative fabric. But some order can be discerned.

38. The *only* jurisdiction the Board as such currently has under section 50 of the *Occupational Health and Safety Act*, is to adjudicate complaints that an employer (or someone acting on an employer's behalf) has breached subsection 50(1) of the Act. That is, the Board is limited to adjudicating complaints that a worker has suffered reprisals *because s/he* has acted in compliance with or sought enforcement of the Act or Regulations. Section 50 does not give the Board a plenary jurisdiction under the *Occupational Health and Safety Act*. More specifically, section 50 does not give the Board a general jurisdiction to investigate or inquire into work refusals, allegations that a workplace is unsafe, or that sections of the Act other than section 50, or the Regulations, have been breached.

39. Further, the Board has no jurisdiction to investigate or inquire into claims that a worker has suffered a work related injury or disability. The Workers' Compensation Board and the Workers' Compensation Appeals Tribunal currently exercise that jurisdiction under the *Workers' Compensation Act* (a statute which is being replaced by new legislation in January, 1998).

40. The workers' compensation scheme in Ontario is mandatory for the majority of employers and workers in the Province, whether or not the workplace is unionized. It is intended to benefit both employers and workers by providing a no-fault income replacement insurance plan which largely (but not entirely) replaces and takes away the right of workers who suffer work-related injuries or disabilities to pursue traditional common law remedies in Court. The extent to which the workers' compensation scheme occupies the field suggests that no other forum is appropriate in that respect, except where legislation specifically so provides.

41. Similarly, the Board has no jurisdiction under the Ontario *Human Rights Code* (except arguably when the Board sits as an arbitrator in the construction industry under section 133 of the *Labour Relations Act, 1995*, when considering section 15 of the *Labour Relations Act, 1995*, and as a law of general application). The Ontario Human Rights Commission and the Boards of Inquiry to which the Commission refers complaints under section 36(1) of the *Human Rights Code* investigate and adjudicate complaints that the Code has been violated. (Labour relations boards of arbitration also exercise a *Human Rights Code* jurisdiction to the extent that grievances filed under a collective agreement raise an issue concerning the interpretation and application of the Code.)

42. In *Meridian, supra*, the Board described how the Code operates and what it covers. I find it unnecessary to repeat or set out that analysis. However, it does bear repeating that the Code contains provisions which deal extensively with employment and workplace issues. The Code specifically prohibits discrimination with respect to employment (subsection 5(1), supplemented by other more general provisions such as sections 9, 10, 11, 17 and 25), specifically prohibits harassment in employment (subsection 5(2)), and even more specifically prohibits sexual harassment in the workplace (subsections 7(2) and (3)). The Code also contains a reprisal protection (in section 8). But this reprisal jurisdiction is retained by the Commission and human rights Boards of Inquiry; it has not been given to the Board.

43. Stress and other non-physical symptoms may, but do not necessarily, suggest that a workplace hazard is present. Workplace hazards may be physical or non-physical, but it is apparent that the *Occupational Health and Safety Act* and Regulations are primarily directed at physical hazards and the physical effects of workplace hazards. The structure of the *Occupational Health and Safety Act*,

and the investigation and enforcement mechanisms created by it are poorly suited to dealing with non-physical hazards or effects. The *Workers' Compensation Act* is specifically structured to deal with negative health and safety consequences related to the workplace; namely, with work related injuries or disabilities. This includes physical and non-physical injuries or disabilities. There is an important physical component to the issues that the *Human Rights Code* is directed at. But a very important component of the Code's jurisdiction concerns non-physical conduct and the effects of that conduct. The Code clearly and explicitly deals with harassment and discrimination in employment, and it contains a comprehensive administrative and adjudicative scheme, which includes a power of continuing supervision, for dealing with these sorts of issues, and which specifically contemplates compensating workers for the mental anguish they suffer as a result of being harassed or discriminated against in the workplace. I observe that unlike Saskatchewan's *Occupational Health and Safety Act*, for example, the *Occupational Health and Safety Act* in this Province does not specifically deal with harassment. And unlike the Ontario *Human Rights Code*, the *Occupational Health and Safety Act* does not specifically contemplate damages for harassment or mental distress.

44. However important issues of workplace discrimination, harassment or "poisoned environment" are, and however much these may affect the actual health, safety or well-being of a worker, it is apparent that the legislative treatment of these non-physical "hazards" is different from the legislative treatment of physical hazards. The Board's jurisdiction under section 50 of the *Occupational Health and Safety Act* must be assessed in the context of this complex legislative and adjudicative scheme. The Board's role under section 50 of the *Occupational Health and Safety Act* is narrow and quite specific. The Board's jurisdiction is specific to the same kind of reprisal jurisdiction it has under other statutes, the *Environmental Protection Act*, for example. It is no part of the Board's job in a complaint under section 50 to rectify or remedy health and safety problems, as such. Indeed, the Board does not even inquire into the existence of health and safety problems, except to the extent that it is necessary to do so in order to properly deal with a reprisal complaint. Nor is the Board in a position anything like that of the Courts which have a broad and far-ranging inherent common law jurisdiction to deal with matters which may raise complex issues of fact and law, and questions concerning the interpretation and application of different statutes. Further, it is worth noting that notwithstanding this broad inherent jurisdiction, the Courts have become more and more willing to defer to a tribunal which appears to have statutory jurisdiction over the primary issue, albeit taking into account the apparent deficiency of the administrative law forum (see, for example, *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (Supreme Court of Canada)).

45. For the reasons given in *Meridian*, *supra*, I am satisfied that the Board's jurisdiction to deal with questions of harassment and discrimination in a complaint under section 50 of the *Occupational Health and Safety Act*, is at best indirect, and indeed rather remote, when compared to the jurisdiction of the Human Rights Commission and human rights Boards of Inquiry to do so in the exercise of their specific and direct jurisdiction under the *Human Rights Code*. This does not mean that the Board will decline to inquire into a complaint under section 50 of the *Occupational Health and Safety Act* merely because the factual basis asserted for the complaint includes discrimination or harassment. However, where the "pith and substance" of the complaint concerns harassment or discrimination, it is generally appropriate for the Board to dismiss a section 50 complaint in the exercise of its discretion under subsection 50(2). The more difficult case will be one in which a significant *Occupational Health and Safety Act* reprisal issue and significant discrimination or harassment issues are both raised. In such a case, the question will be whether the Board ought to proceed with the complaint or defer it to another forum; namely, the one created by the *Human Rights Code*. Further, even if the Board considers it appropriate to defer in such a case, it may well be appropriate for the Board not to dismiss the complaint, but to adjourn it pending the filing or disposition of the matter at the Human Rights Commission.

46. What then is the applicant's complaint in this case? She complains:

- (a) about the amount of work she had to do and the time within which she had to do it;
- (b) that she was given inadequate training and resources, and was forced to work unpaid overtime hours;
- (c) that her conditions of employment constituted differential treatment and that she was harassed and discriminated against by the responding employer;

(d) that she has suffered stress and physical illness, and emotional distress as a result of working conditions which she alleges constituted a serious workplace hazard, and that as a result of this and rude and degrading treatment she believed her job was threatened;

(e) that her employer was oblivious to her obvious difficulties and failed to do anything about them, notwithstanding that she complained about not being treated fairly or with consideration, and notwithstanding that her employer was aware that she was being harassed;

(f) that her employer failed to accommodate her hearing impairment;

(g) that her employer sought to speak to her and obtain medical information after she stopped working;

(h) about the termination of her employment; and

(i) that she has been discriminated against on the basis of race and physical disability (i.e. her hearing loss).

47. The question is whether the complaint suggests a *prima facie* case that the responding employer, or someone acting on its behalf, dismissed or threatened to dismiss the applicant, disciplined or suspended her or threatened to do so, imposed a penalty on the applicant, or intimidated or coerced her *because* she acted in compliance with or sought enforcement of the *Occupational Health and Safety Act* or Regulations. Does the complaint suggest a rational and objectively sustainable arguable case in that respect?

48. The mere fact that a worker is injured or becomes ill and is subsequently disciplined or discharged is not enough to suggest a breach of subsection 50(1). The effect of events on a worker will be relevant at the remedial stage. But when assessing whether the Act has been breached, or whether a *prima facie* case of a breach of the Act has been alleged, it is what the worker did to comply with or seek enforcement of the Act or Regulations and what the employer is alleged to have done in response which are the relevant considerations.

49. I am satisfied that the complaint does not make out a *prima facie* case in that respect. The applicant concedes that she never specifically invoked the protection of the *Occupational Health and Safety Act* or Regulations. I am satisfied that there is nothing which she did or said which was or could reasonably have been taken to be an attempt to act in compliance with or seek enforcement of the Act or Regulations, or that she reasonably believed that she was doing so. In that respect, there is nothing in her complaint which supports paragraph 45 of her pleadings (see paragraph 16, above) and her assertion that she exercised her right to refuse unsafe work or that she withdrew from work in the exercise of her rights under the *Occupational Health and Safety Act*. Indeed, in this case it appears that the alleged health and safety problem and the alleged reprisal are the same thing. There is nothing to suggest that anything which she complains about, including the termination of her employment, occurred *because* she implicitly sought to exercise her rights under the Act, or *because* she had rights under the Act.

50. There is nothing in the complaint that suggests that the responding employer threatened to dismiss the applicant *because* she was exercising rights under the Act. There is nothing in the complaint that suggests she was discharged *because* she was exercising rights under the Act.

51. A change in conditions of employment, differential treatment or harassment, and perhaps even rude and degrading treatment or a failure to accommodate a disabled employee's needs, could conceivably amount to a penalty, or to intimidating or coercive conduct which constitutes a reprisal prohibited by subsection 50(1) of the *Occupational Health and Safety Act*. That is a conclusion which the applicant pleads, but there is nothing in her pleadings which arguably supports this conclusion.

52. The applicant's duties and responsibilities came with the promotion she accepted in January 1994. To the extent that these changed over time, there is nothing which suggests that her duties and responsibilities were imposed or changed in an improper response to the applicant's exercise of rights under the *Occupational Health and Safety Act* (whether or not she was aware of such

rights). The applicant complains about her working conditions, duties and responsibilities, training and resources, and the alleged failure of the responding employer to investigate or do anything about these may raise questions concerning other provisions of the *Occupational Health and Safety Act*. But in this case, this raises no issue or reprisal under subsection 50(1). The fact that the applicant was forced to work unpaid overtime hours may raise *Employment Standards Act* issues, but there is nothing in this complaint which suggests an issue under subsection 50(1) of the *Occupational Health and Safety Act*. That the applicant may suffer from work-related physical or emotional illnesses or disabilities may suggest a workers' compensation issue. In this complaint it does not suggest a subsection 50(1) issue. The alleged failure to accommodate the applicant's hearing disability, and the alleged harassment and discrimination as pleaded appear to raise human rights issues. In this case, they raise no concomitant subsection 50(1) reprisal issue. Nor does the fact that the employer sought medical information and to speak with the applicant about her illness and absence from work even arguably constitute or raise a reprisal issue.

53. Does the applicant have a basis for wrongful dismissal, disability benefits or tort action in the Courts? Perhaps. Does she have a workers' compensation claim? Perhaps. Does she have an *Employment Standards Act* claim? Perhaps. Does the applicant have a human rights complaint? Perhaps. Does she have the basis for a claim that provisions of the *Occupational Health and Safety Act* other than subsection 50(1) have been breached? Perhaps. But what she does not have, on the face of her complaint, is an arguable *prima facie* basis for a complaint to the Ontario Labour Relations Board that the responding employer has breached subsection 50(1) of the *Occupational Health and Safety Act*. I am therefore satisfied that the complaint should be dismissed as disclosing no *prima facie* case.

54. In the alternative, even if there is some scintilla of a basis for a section 50 complaint to this Board, this would be an appropriate case for the Board to exercise its discretion to refuse to inquire into it. It is readily apparent that the pith and substance of this complaint is harassment and discrimination contrary to the *Human Rights Code*. The tenor of the complaint, the specific allegations contained in it (particularly the concluding paragraph of Schedule "B"), the relief requested, the absence of any effort to specifically or implicitly invoke the *Occupational Health and Safety Act*, and her August 21, 1996 letter complaining of human rights violations all demonstrate this. The harassment and discrimination complained of are specifically dealt with in the *Human Rights Code* and are at the core of the jurisdiction of the Human Rights Commission and its Boards of Inquiry, and the complaint raises issues which are best and appropriately dealt with under the *Human Rights Code*.

27. I return now to the facts. The applicant, on short notice, advised the company that he would be off work for two weeks. Towards the beginning of this two week period, he was involved in a car accident, which rendered him physically unable to return to work, and for an indefinite period. While he was off work, and when he submitted to the company his claim for short term disability benefits, the company told him that he had already been terminated. Subsequent investigation by the applicant confirmed this.

28. Whether Mr. Abdulkadir's termination, and the company's assertion that he had abandoned his job, were the result of miscommunication, inadvertence, or intention to penalize the applicant for the reasons asserted in the application, does not change the fact that he was either terminated because of a dispute over his attendance or non-attendance at work, or over his communication or lack of communication with the company in this respect, or (as asserted) because the company wanted to avoid any obligation to accommodate him upon his return to work (a proposition difficult to maintain in light of the settlement offers made during the grievance procedure, but one which is nevertheless accepted for purposes of this decision).

29. On these facts, as alleged, there is nothing to suggest that the applicant was seeking to enforce the provisions of the OHSA (or the regulations or order made thereunder), or acting in compliance with those provisions, or even attempting to do so. Similarly, there is nothing in the matters as pleaded that suggests how the company might have engaged in a reprisal or a threatened reprisal, or any untoward, inappropriate, or unlawful action towards the applicant *because* the applicant was either

acting in compliance with or seeking the enforcement of the provisions of the OHSA or its regulations or orders made thereunder.

30. There is no doubt that Mr. Abdulkadir and Dough Delight have an employment dispute. Whether breaches of other statutes or the collective agreement might exist, the Board cannot say. Those are not matters that fall within the Board's jurisdiction under section 50 of the OHSA, and in any event, they are appropriately dealt with, if at all, in other forums (although it appears as if the alleged breach(es) of the collective agreement have already been considered during the steps of the grievance procedure).

31. Looking at the particular conduct complained of in more detail highlights that there is no arguable case pleaded for a breach of section 50(1) of the OHSA. For example, the applicant alleges that the company refused to give him his vacation pay when he was entitled to receive it, and that he was fired prior to his ability to file his claim forms for short term disability benefits. Where is there any suggestion of an attempt to seek to enforce any provision of the OHSA, or to act in compliance with the Act? Where is there any suggestion of a reprisal or response from the employer that resulted from or flowed from the exercise of rights under the OHSA? Where is the causal link pleaded that suggests the applicant was somehow penalized or threatened *because* of the exercise of any statutory rights under this Act?

32. Section 50 is not a mechanism by which an individual can complain to the Board about any concern over his or her health and safety in the workplace. Whatever the legitimate and serious concerns about health and safety an individual may have arising from workplace events, if those concerns do not arise in the context described by, and circumscribed by, section 50, then a complaint does not lie to this Board pursuant to that section.

33. As stated, there appears not to be an arguable case pleaded here, and this application is accordingly dismissed.

34. Alternatively, in the exercise of the Board's discretion under section 50(3), the Board declines to inquire into this matter further. Even if there were pleaded an arguable case for a breach of section 50(1) of the OHSA, when one reads the materials forwarded by and relied upon by the applicant, it is apparent that the core (and periphery) of the dispute between the applicant and the company is a dispute over how he was treated while off work for an injury, both before and after the company terminated him. There is no suggestion that he was or might have been injured at work, or exposed to a hazard or danger at work. There is nothing pleaded that raises a concern or issue that invokes the core concern of the statute - health and safety dangers or risks at work, whether caused by objects, machines, people, or the workplace environment.

35. Accordingly, on this ground as well, the application is dismissed.

2764-97-R Labourers' International Union of North America, Local 183, Applicant v. Dunbury Homes (Holly) Ltd., Responding Party

Certification - Construction Industry - Intimidation and Coercion - Representation Vote - Unfair Labour Practice - Employer asking Board not to give effect to result of representation vote and to dismiss union's application for certification under section 11(2) of the Act on grounds of alleged intimidation of employees - Employer also asserting that employee denied reasonable opportunity to vote as result of union misrepresentation - Employer also asking Board to dismiss application because only one of two eligible voters cast ballots - Board satisfied that

there was no unlawful intimidation, that the employees had an adequate opportunity to vote, and that section 10(2) of the Act does not require more than one employee to cast ballots in a representation vote before the Board can give effect to that vote - Certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *John Moszynski, Al Bremner and Luis Tores* for the applicant; *Daryn Jeffries and Philip Litowitz* for the responding party.

DECISION OF THE BOARD; May 28, 1998

1. The name of the responding employer is amended to "Dunbury Homes (Holly) Ltd." ("Dunbury").

2. This is an application for certification in the construction industry. A representation vote has been ordered, held and counted.

3. The employer submits that notwithstanding that the sole ballot cast in the vote was marked in favour of the applicant, the application should be dismissed pursuant to subsection 11(2) of the *Labour Relations Act, 1995*, which provides that:

(2) Upon the application of an interested person, the Board may dismiss an application for certification of a trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. A trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.

4. In the alternative, the employer submits that the Board should hold another vote.

5. There were two employees at work in the bargaining unit on October 24, 1997, the certification application date. Accordingly, they are the only employees in the bargaining unit for purposes of this application (see, *Ken Anderson Electric Inc.*, [1996] OLRB Rep. Sept./Oct. 846). Both bargaining unit employees testified before the Board as Dunbury's witnesses at the hearing held on May 21, 1998. When the company closed its case, the union elected to call no evidence.

6. In the result, the two bargaining unit employees were the only witnesses. Adam Keeping is the employee who did not vote. Although the company withdrew its allegation of bad faith, it asserted that this employee was denied an adequate or reasonable opportunity to vote as a result of misrepresentations by the union. Bill Rowbottom is the employee who did vote. Dunbury alleges that the applicant's conduct improperly influenced him to vote in favour of the union, and that the manner in which he marked his ballot is not a reliable indicator of his true wishes.

7. Upon considering the evidence before the Board, and the representations of the parties, I am not satisfied that either is the case.

8. Adam Keeping presented as a self-assured, mature young man who has his head squarely on his shoulders. He has been employed by Dunbury as a labourer since he finished school in mid-June 1997.

9. Mr. Keeping was first approached by representatives of the applicant while attending a "propane course". Subsequently, in or about early October 1997, Allan Bremner and Luis Tores (both of whom are Business Representatives employed by the applicant union) approached him at the job site. They provided Mr. Keeping with two booklets which explained what the union is, who it represents and what it stands for, and what it does. Subsequently, the applicant's representatives asked Mr. Keeping to sign a "card" (which is generally understood in the labour relations community to be an application for membership in a union), indicating that the employees could expect to receive a wage increase and a benefits package if the applicant was certified. It is apparent that Mr. Keeping did not simply swallow the sales pitch which was given by the union's representatives because in addition to reading the material he was given, he discussed the matter with his father and with friends, in an effort to find out more about what unionization meant and involved.

10. Mr. Rowbottom is 60 years old, and obviously not inexperienced in the ways of the world. He has been employed by the company as a labourer since mid-September 1997. Mr. Rowbottom first heard about the applicant's possible interest in Dunbury when Mr. Keeping told him about being approached by union representatives at the propane course. Subsequently, Mr. Rowbottom was also approached on the job by Al Bremner and Luis Tores, who tried to persuade him to sign a card as well.

11. Mr. Rowbottom testified that he and Mr. Keeping discussed the matter. Indeed, Mr. Rowbottom said that he and Mr. Keeping got into a "little fight" or "row", not about whether they should seek union representation but about when they should do so. Although he supported the idea of unionization, Mr. Rowbottom was in no rush and preferred to wait until Christmas. Mr. Keeping, on the other hand, expressed the view that they should either "do it now or not at all". It appears that Mr. Rowbottom thought it would be "safer" to wait until Christmas, while Mr. Keeping was more nonchalant and considered that "if you lose this job, there will be another." Neither party explored what either employee meant by this.

12. In due course, this application was filed, and by decision dated October 29, 1997, the Board (differently constituted) directed that a representation vote be held on November 3, 1997.

13. During the period between the certification application date and the day of the vote, the union's representatives continued their contact with the two employees. In that respect, Mr. Keeping was told by the union that the vote would be conducted between 7:00 and 8:00 a.m., on Monday, November 3, 1997. This was incorrect. Although the union's application requested that the vote be conducted between 7:00 and 8:00 a.m., the voting arrangements which the Board settled on had the single poll open for only half an hour, from 7:00 to 7:30 a.m. (which is consistent with the Board's practice when the number of employees eligible to vote is obviously very small). However, the union's representatives also suggested to Mr. Keeping that he check the Board's notices for information concerning the vote arrangements, and he was also urged, both by them and by others (including persons who it appears more probably than not were associated with the company) to come to work at 7:00 a.m. in order to vote. Mr. Keeping testified that he did look for the Board's notices but could not find them. It appears that he did not ask anyone where the notices were or otherwise pursue the matter, and he was under the impression that he had until 8:00 a.m. to vote.

14. In any event, when the day of the vote came, Mr. Keeping slept in. When he did get up, he had difficulty starting his car. After 15 to 20 minutes he was able to start it, and as he was about to leave for work, at approximately 7:35 a.m., he received a telephone call from one of the union's representatives (Luis Tores) urging him to come and vote.

15. When Mr. Keeping finally arrived at the job site at 7:40 to 7:45 a.m. he was met by Mr. Tores who told him that he was too late to vote, which was of course true.

16. The employer is quite right when it submits that employees must be given a reasonable opportunity to cast a ballot in a certification application vote. I am satisfied that the voting arrangements made in this case gave the two employees a reasonable opportunity to vote. That is not really the question. The question is whether Mr. Keeping was misled by the union into missing his opportunity and was therefore in effect denied a reasonable opportunity to vote.

17. On the evidence before the Board, there is no doubt that the union misinformed Mr. Keeping about the time of the vote. I am satisfied that this was an innocent misrepresentation, apparently based on the unwarranted assumption that the vote would be held during the time requested by the union. It is clear that the union's representatives did not intend to mislead Mr. Keeping or to keep him from voting. On the contrary, they requested that he check the Board's notices for the voting arrangements, they urged him to vote, and they urged him to come to work early in order to do so.

18. I am satisfied that the union's innocent misrepresentation in this case did not have the effect of denying Mr. Keeping an appropriate opportunity to vote. First, he could have done more than he did to locate the Board's notices in that respect than he apparently did. He could, for example, have asked someone where they were. (Although Mr. Rowbottom also testified that he saw no Board notices, there was no suggestion by either the employer or the union that the company did not post the Board's notices as directed.) Second, although Mr. Keeping wanted and intended to vote, the union's innocent misrepresentation had nothing to do with his missing his opportunity to do so. The union's misrepresentation did not cause him to sleep in. It did not cause his car not to start. In short, nothing the union did caused Mr. Keeping to miss his opportunity to vote.

19. In any vote, whether under the *Labour Relations Act, 1995* or otherwise, there is a time when the polls open and a time when the polls close. As a general matter, if a person is unable to present himself at a poll during voting hours he will miss his opportunity to vote. That is equally the case in votes under the *Labour Relations Act, 1995*, unless the times during which the polls were open are unreasonable, or a person is caused to miss the opportunity to vote by conduct intended to have that result.

20. I have already concluded that the voting arrangements presented the employees with a reasonable opportunity to vote in this case, and also that the union's misrepresentation was both innocent and could have been verified (or in this case, corrected). Further, there is no reason to think that the union's misrepresentation caused Mr. Keeping to miss his opportunity to vote. There is no reason to think that he would not have slept in or that his car would have started if the union had given him accurate information or no information at all.

21. The Board is therefore satisfied that Mr. Keeping had an adequate and reasonable opportunity to vote, and that there is no cogent reason to give him another.

22. I turn now to Dunbury's other allegations. Mr. Keeping and Mr. Rowbottom both testified that the union's representatives did not specifically tell them how to vote. However, it is clear that the employees understood that the union wanted them to vote for certification. That should surprise no one since that is why a union applies for certification.

23. Mr. Keeping said that the union did not make him any promises. But of course, the union's representatives did tell him, and also Mr. Rowbottom, that the employees could expect to receive better wages and benefits if the union was certified. This may not have come in the form of a "promise", but it was a representation. But Dunbury does not point to this as a basis for its request that the application

be dismissed or another vote be held. After all, this is typically part of a union's approach when it seeks to organize employees (and indeed a union is often able to achieve some improvements for employees in that a respect).

24. Dunbury's complaint focuses on two other representations. Mr. Keeping testified that he was told that if the application did not succeed, the union would not be able to protect the employees, and that if he or they were laid off or fired the union could not "defend" them or find them work elsewhere. Instead, the employees would be left on their own. Mr. Rowbottom testified that he felt pushed or "harped upon" and that he was told that "if you don't sign a fucking card, you will never get a job in Barrie" (or words to that effect).

25. As the employer points out, the Board has long employed an objective test when called upon to assess the conduct of a trade union in an organizing drive or application for certification; that test being the effect that the conduct under consideration would probably have on the reasonable ordinary employee (see, for example, *Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611; *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444; and *Davis Distributing Limited*, [1994] OLRB Rep. Sept. 1190).

26. That being the case, the Board will not usually entertain a parade of employee witnesses called to testify about their subjective perceptions or opinions about the very issues which are before the Board, and which are therefore for the Board to determine. However, it goes without saying that the Board's assessment of the conduct complained of must include a consideration of the context and all the relative circumstances, and it is apparent from the jurisprudence that the Board will listen to what employees have to say about what they understood was being said. (See, *Centro Mechanical Inc.*, [1996] OLRB Rep. Sept./Oct. 762, where the Board dismissed an application for certification under section 11(2) of the Act.) The weight that the Board will give such subjective evidence when it applies the objective test will depend on the circumstances of the particular case, and the Board's assessment of the reliability of such evidence.

27. Both of the employees in this case testified that they did not feel threatened by anyone. Mr. Keeping said that all that the union was saying to him was that it could not be there to represent or protect him if it was not certified, and that his father told him exactly the same thing. Mr. Rowbottom said that the statement cited in paragraph 24, above, was made in the context of a fifteen minute conversation, and that in that context he took it to mean that if he was not a union member he could not get other union work, which was something he was interested in.

28. While he was testifying about the statement complained of by the employer, Mr. Rowbottom made the following unsolicited comment:

"What are you going to do, it didn't cost nothing, and I am going to get pushed down some stairs by my fellow employee?"

The offhanded manner in which this comment was made, the way that Mr. Rowbottom shrugged as he made it, and my observation of the two employees in the hearing room suggest to me that this was an "oh what the hell" kind of exaggeration arising out of the "row" between the two employees, and indicates that Mr. Rowbottom became resigned to signing a card and supporting the application. It was clear from Mr. Rowbottom's evidence that he did not in fact feel physically (or otherwise) threatened.

29. In the result, I am not satisfied that any of this constitutes a violation of the Act. Did the union's representatives apply some pressure to the employees to obtain their support? Of course they did, but that is neither unexpected nor the issue. The *Labour Relations Act, 1995* guarantees employees the right to freely choose whether or not they wish to be represented by a trade union that seeks to do

so. The Act does not guarantee freedom from pressure in that respect. (*Can-Eng Metal Treating Ltd.*, *supra*; *Centro Mechanical Inc.*, *supra*.)

30. There is nothing in the Act which precludes a union from trying to sell itself to employees it seeks to represent. That is how unions organize. Similarly, the Act specifically protects an employer's freedom to express its view of unionization, so long as it does not use coercion, intimidation, threats, promises or undue influence to do so (section 70). It is implicit in the Act that unions have a concomitant right.

31. Pressures of varying degrees and kinds are a normal part of everyday life. Choosing whether or not to be represented by a trade union is a significant decision. But most if not all of life's significant decisions are made under some pressure, sometimes extreme pressure. Indeed, the more significant a decision is perceived to be, the more pressure tends to be associated with it.

32. The question here is whether the union subjected the employees to undue or improper pressure, such that they were either threatened, intimidated or coerced into supporting the application, or such that the vote result is an unreliable indicator of the employees' true wishes.

33. In that respect, I observe that since Mr. Keeping did not cast a ballot, and I have concluded that nothing the union did prevented or dissuaded him from doing so, the statements complained of appear not to raise a section 11(2) issue. Further, to the extent that it might be argued that the statements complained of raise a question concerning the reliability of the union's membership evidence, upon which the Board relied in order to direct a representation vote which was held, both the certification scheme in the current Act in general and subsection 8(9) in particular suggest that such an issue cannot be raised.

34. But whether or not that is the case, I am not satisfied that the statements complained of constitute a violation of the Act, or otherwise raise any question concerning the reliability of the representation vote which has been taken.

35. It is true, as Dunbury points out, that threats to employees' physical well-being or job security are contrary to the Act and can (and often will) cause the Board to invoke the provisions of section 11 of the Act. In this case, the Board is satisfied that no one was threatened with physical harm. The Board is also satisfied that the employees' understanding of what was said to them was both reasonable and correct, and that the union made no threat to either employees' job security. As part of its "sales pitch", the union suggested to the employees that they could get them better wages and benefits, protections and job security they would not have without the trade union, and opportunities for employment with other union employers. That is all it did. Not only are these the standard advertised benefits of unionization, there is much to suggest that, in the construction industry at least, a construction trade union can usually deliver some benefits in these respects. What happened here is entirely different from cases like *Walter E. Selck of Canada Limited*, [1964] OLRB Rep. June 138 and *Aurora Steel Service Limited*, [1986] OLRB Rep. Mar. 301 where the union in each case threatened that if it was certified employees who had not supported it would lose their jobs.

36. I observe also that Mr. Keeping at least also had discussions with Dunbury's site supervisor concerning the application and specifically concerning the wages and benefits which the employees must expect to receive if the applicant was not certified.

37. I am satisfied that there was nothing improper in anything that the employer's site supervisor said in that respect, or in anything that the union's representatives said in their perhaps more intensive salesmanship.

38. Finally, Dunbury submitted that the Board could not give effect to the result of the vote because only one ballot had been cast. The employer's argument in that respect was based entirely upon the use of the words "by the *employees*" [emphasis added] in subsection 10(1) of the Act. Subsection 10(1) provides that:

10. (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

39. There is no merit to this argument.

40. First, clause 28(j) of the *Interpretation Act* provides that:

- (j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse.

That is, where a statute uses the singular, it also applies to the plural and vice-versa.

41. Second, the Act specifically requires that every bargaining unit in an application for certification consist of more than one employee (subsection 9(1)). There is no minimum ballots cast requirement. All vote results requirements are expressed in terms of percentages. Nor should it be otherwise. Employees in a bargaining unit have a right to vote, but they do not have an obligation to do so. An employee who declines or misses his opportunity to vote leaves his labour relations fate in the hands of the employees who do vote. Where only one employee votes, that employee's wishes are determinative, whether there were two, ten or one hundred employees eligible to vote, but who for whatever reason do not do so. As in every democratic vote, the results are determined by those who vote, not by those who do not.

42. In the result, the Board is satisfied that there is no reason not to give effect to the results of the vote taken in this application.

43. As I have already indicated, the sole ballot cast was marked in favour of the applicant union. Accordingly, more than fifty per cent of the ballots cast were cast in favour of the union, and pursuant to subsection 10(1) of the Act, the applicant is therefore entitled to be certified.

44. A certificate shall therefore issue to the applicant for the bargaining unit determined by the Board in the October 29, 1997 decision; namely:

all construction labourers in the employ of Dunbury Homes (Holly) Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

45. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

46. The responding party is directed to post copies of this decision immediately, adjacent to the "Notice to Employees of Application and of Vote" posted previously. These documents must remain posted for a period of 30 days.

0261-98-PS Grand Erie District School Board, Applicant v. The Canadian Union of Public Employees, Ontario Public Service Employees' Union and Ontario Secondary School Teachers' Federation, Responding Parties

Public Sector Labour Relations Transition Act - Parties disputing number and description of bargaining units appropriate for successor District School Board's operations - Parties disputing whether bus drivers should have their own bargaining unit or be included in custodial and maintenance bargaining unit - Parties also disputing whether educational assistants should be in their own bargaining unit or be included in office-clerical bargaining unit - Board ruling that bus drivers should be included in custodial and maintenance unit and that educational assistants should have separate bargaining unit

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *Stephen Gleave* for the applicant; *John Elder* for the Canadian Union of Public Employees; *David Wright* for Ontario Public Service Employees' Union; *Brendan Morgan* for Ontario Secondary School Teachers' Federation.

DECISION OF THE BOARD; June 22, 1998

1. This is an application under sections 22 and 23 of the *Public Sector Labour Relations Transition Act, 1997* (the "PSLRT"). The applicant school board seeks a determination of the number and descriptions of the bargaining units appropriate to its amalgamated structure. Three predecessor school boards ("Norfolk", "Brant", and "Haldimand") have been merged to create the applicant, each having various collective bargaining relationships.

2. Those pre-existing relationships are set out in the pleadings filed and essentially represent the presence of four bargaining units in the old Brant board; four units in the Haldimand board; and four in the Norfolk board. There is some consistency among these bargaining units. In these proceedings the applicant was seeking a total of five bargaining units; CUPE was advocating a total of three bargaining units. OPSEU and OSSTF each made representations only in respect of certain bargaining units consistent with the positions of either CUPE or the school board.

3. The essential disputes between the parties are two. The school board took the position that a separate bargaining unit for educational assistants was appropriate. CUPE took the position that educational assistants ought to be included in the office-clerical bargaining unit. Both these positions were reflected in the historical relationships at one or more of the predecessor boards. Secondly, the school board was advocating a separate bargaining unit for bus drivers while CUPE took the position that bus drivers ought to be included in the custodial and maintenance bargaining unit.

4. The parties were in essential agreement that there ought to be an office and clerical bargaining unit; a custodial and maintenance bargaining unit; and a professional student services personnel bargaining unit. The precise configuration of these units however depended on the outcome of the above-noted disputes.

5. A consultation was held on Friday, June 19, 1998. Having reviewed these matters with the parties I made the following oral ruling:

Regarding bus drivers:

I reject the school board's assertion that this issue is moot - bargaining rights are not extinguished by the fact that there are not any employees in the bargaining unit at the moment. However that

does not address the issue of within which bargaining unit bus drivers ought to fall. The fact that there are no employees in the stand-alone unit for drivers does suggest that maintaining that stand-alone unit is less appropriate than placing them in the larger custodial and maintenance units. Fragmentation in this situation is an issue. Bus drivers are to be included in the larger custodial and maintenance bargaining unit.

Regarding educational assistants - both pre-existing bargaining units are appropriate and viable. Sometimes there is little to choose as between one or the other. I disagree that a stand-alone unit of educational assistants would be smaller/weaker given the combined size of that unit. Nor has the Board concluded that "bigger is *always* better". There are minimal limits on mobility in a stand-alone unit given the very different skill set and work of educational assistants compared to office and clerical employees. There is some evidence of labour relations problems where educational assistants have been included in the larger office and clerical units. These reflect issues that are subject to bargaining but which remain somewhat unresolved. If the bargaining units are separate the parties may be required to focus more specifically on these issues that relate specifically to educational assistants. I note that the employer is not objecting to this degree of fragmentation or any additional costs associated with bargaining reflecting its view of the need. In the long run, if feasible it may be easier for parties to continue units than to separate them. The funding issue (classroom vs. non-classroom) is of some limited concern as it too reflects a potential for creating internal tensions in bargaining which may result in labour relations problems. Finally, given the particular pre-existing configuration of the bargaining units I'm satisfied there is a representation issue that warrants consideration in determining the issue. On balance, there will be a separate bargaining unit for educational assistants.

6. Having made this ruling I adjourned to allow the parties the opportunity to discuss the precise parameters of the bargaining units and to deal with any vote issues. They were able to largely agree although there is some dispute with respect to certain positions in certain of the units. Those disputes however do not affect the ability of the Board to conduct the appropriate votes.

7. The bargaining units agreed to by the parties are described as follows:

Bargaining Unit #1 - Facility Services, Transportation Services and Maintenance Services Employees

The Grand Erie District School Board recognizes the Union as the sole and exclusive bargaining agent for all employees engaged in facility services, transportation services and maintenance services save and except supervisors and those above the rank of supervisors, health and safety officer, environmental officer, and pending resolution by the Board excluding as well *students and persons employed under co-op programs or work incentive programs*.

Bargaining Unit #2 - Clerical and Technical

The Grand Erie District School Board recognizes the Union as the sole and exclusive bargaining agent for all office, clerical and technical employees of the Grand Erie District School Board save and except supervisors, persons above the rank of supervisors, human resource co-ordinators, human resource secretaries, buyers, and pending resolution by the Board, excluding as well *communications and records management officer, training and developmental officer, administrative assistants, local service representatives, security to the manager of facility services, accounting analyst, budget grants officer, students and persons employed under co-op programs or work incentive programs*.

Bargaining Unit #3 - Professional Student Services Personnel

The Grand Erie District School Board recognizes the Union as the sole and exclusive bargaining agent for all employees of the Grand Erie District School Board employed as Psychologists, Speech Pathologists, Psychological Services Consultants, Psycho - Educational Assessment Counsellors, Social Workers, Youth Counsellors, Attendance Counsellors, save and except supervisors and those above the rank of supervisor.

Bargaining Unit #4 - Educational Assistant Employees

The Grand Erie District School Board recognizes the Union as the sole and exclusive collective bargaining agent for all educational assistants. Without limiting the foregoing the bargaining unit includes the positions of:

Educational Assistant - Regular
Educational Assistant - DD
Educational Assistant - Food Technician
Communication Disorders Assistant

8. The parties agree that OSSTF properly represents the employees within the professional student services personnel bargaining unit. Representation votes are required in the other three. In the facility services, transportation services and maintenance services bargaining unit and in the office and technical bargaining unit voters will be asked if they wish to be represented by CUPE or OSSTF in their employment relations with the school board. In the educational assistants bargaining unit voters will be asked whether they wish to be represented by CUPE or OPSEU in their employment relations with the school board.

9. The parties were not able to agree on a vote date. Having heard the parties' representations, and in an attempt to balance the needs of notice to the affected employees, some opportunity for the bargaining agents to contact affected employees, and the need for expedition, the vote will be held on July 9, 1998. Vote arrangements are set out in the attached "Notice of Vote".

10. There are disputes between the parties as to whether certain positions ought to be included in or excluded from certain bargaining units. Those positions are reflected earlier in the bargaining units described as those positions which are pending resolution by the Board. In the facility services, transportation services and maintenance services bargaining unit this includes students and persons employed under co-op programs or work incentive programs. In the clerical and technical bargaining unit this includes communications and records management officer, training and development officer, administrative assistants, local service representatives, secretary to the manager of facility services, accounting analyst, budget grants officer, students and persons employed under co-op programs or work incentive programs. If any person holding such a position wishes to cast a ballot, the person shall identify himself or herself as occupying a disputed position and such person shall be entitled to cast a ballot. Any such ballot cast shall be segregated and not counted until the Board so orders or the parties consent.

11. The school board is directed to immediately post copies of this decision and the "Notice of Vote" adjacent to the Board's decision of May 27, 1998. These copies must remain posted for 30 days. The school board is also directed to immediately forward the "Notice of Vote" to each employee affected by the vote, and to forward that notice by priority courier or other comparable delivery method. The school board is also directed to provide to each of the bargaining agents affected by the vote, a list of the names, addresses, and phone numbers of each employee in the bargaining unit for which the bargaining agent is pursuing bargaining rights. Said lists are to be provided no later than Friday, June 26, 1998.

12. Any party or person who wishes to make representations to the Board relating to the conduct of the representation vote must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within seven days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

13. This matter is referred to the Registrar.

2754-96-R; 2772-96-R; 3501-96-R; 3548-96-R Canadian Union of Public Employees, Applicant v. Meadowcroft c.o.b. as **Livingston Lodge & Nutra 2000**, Responding Party; Ontario Nurses Association, Applicant v. Livingston Lodge also known as Meadowcroft also known as Nutra 2000, Responding Part; Canadian Union of Public Employees, Applicant v. Meadowcroft Holdings Inc. c.o.b. as Meadowcroft Health Care Management Group, Meadowcroft Management Holdings Inc., Meadowcroft Group Limited c.o.b. as Meadowcroft Health Care Management Group and c.o.b. as Meadowcroft General Partnership, 1166067 Ontario Limited, George Kuhl, 1107989 Ontario Limited c.o.b. as Nutra 2000, and Livingston Lodge, Responding Parties; Ontario Nurses Association, Applicant v. Meadowcroft Holdings Inc. c.o.b. as Meadowcroft Health Care Management Group, Meadowcroft Management Holdings Inc., Meadowcroft Group Limited c.o.b. as Meadowcroft Health Care Management Group and c.o.b. as Meadowcroft General Partnership, 1166067 Ontario Limited, George Kuhl, 1107989 Ontario Limited c.o.b. as Nutra 2000, and Livingston Lodge, Responding Parties

Related Employer - Remedies - Board declaring various entities involved in retirement home business to be single employer for purposes of the Act - Board declining to issue declaration against the principal of several corporate entities included in the declaration - Board not satisfied that a declaration against the corporate entities' principal would further the goals of the Act's related employer provision

BEFORE: *Pamela Chapman*, Vice-Chair.

DECISION OF THE BOARD; May 12, 1998

APPEARANCES: *Mark Wright* and *Daria Ivanochko* for Canadian Union of Public Employees; *Risa Pancer* for Ontario Nurses Association; *Irv Kleiner* and *Cathy Tadres* for Meadowcroft; *Ernest Rovet* and *Fred Timman* for Nutra 2000.

1. Board files 2754-96-R and 2772-96-R are applications for certification by the Canadian Union of Public Employees ("CUPE") and the Ontario Nurses Association ("ONA") respectively for two separate bargaining units of employees working at Livingston Lodge in Scarborough, Ontario. Representation votes were held in each of the proposed bargaining units on December 9, 1996, and in each case a majority of the ballots cast were cast in favour of the applicant union. However, the parties have been unable to agree on the identity of the employer, and therefore on a final description of the bargaining units.

2. Board files 3501-96-R and 3548-96-R are applications brought by CUPE and ONA respectively under section 1(4) of the Act, seeking a declaration that the various corporate entities listed above, which will generally be referred to in this decision as "Meadowcroft" and "Nutra 2000", are related employers within the meaning of the Act. The parties agreed that the applications for certification and the related employer proceedings would be heard together.

3. Certain preliminary issues were considered at a hearing on February 3, 1997, resulting in an interim decision dated February 24, 1997.

4. Hearings then continued on March 20, 21, 26, 27, April 3, 4, 7, 9, 17, 18, July 24 and 27, 1997. Final argument was heard on July 30 and 31, 1997.

THE FACTS

5. During the course of this proceeding the Board heard lengthy oral evidence from numerous witnesses and received into evidence hundreds of pages of documents. I will not review the evidence of each witness or attempt to describe each document in this decision. Instead, I will summarize in as concise a fashion as possible the facts which appear to be relevant to the questions of who exercises fundamental control over the employees working at Livingston Lodge, and/or whether or not the responding parties carry on related activities or businesses under common control or direction.

6. Livingston Lodge is a retirement home located in Scarborough, Ontario. It provides lodging, food, housekeeping, laundry, 24-hour supervision and various other services, which commonly include nursing care, assistance with the activities of daily living, and social and recreational activities, to elderly residents. It is not a nursing home. Its operations are therefore governed by the *Landlord and Tenant Act*, although it is also under contract with Metro Community Services, Homes for the Aged Division, as a provider of supportive housing.

7. Until May, 1996, Livingston Lodge was owned by 471374 Ontario Limited. Management of the Lodge was provided by Arbor Living Centres, presumably through a contract with the owners. The on-site administrator was Nadia Tablada.

8. Dietary staffing and services at the Lodge were provided by 1107989 Ontario Limited which carries on business as Nutra 2000, under contract with Arbor Living Centres. Fred Timman owns and operates Nutra 2000.

9. On March 19, 1996, Arbor Living Centres provided notice to Fred Timman that their contractual arrangements for the provision of dietary services would be terminated effective April 30, 1996, as Livingston Lodge was under agreement of purchase and sale with closing scheduled for that date.

10. On April 22, 1996, Arbor Living Centres sent notices to all staff advising them of the sale of Livingston Lodge to "the Meadowcroft Group", with an expected closing date of May 1, 1996. The letter indicated that it was a condition of sale that the new owner would offer employment to the existing staff on no less favourable terms and conditions, and that their employment at the Lodge would therefore continue.

11. Nadia Tablada, the administrator of the Lodge under Arbor Living Centres, who has continued as the administrator following the sale, testified that she was also advised of the pending sale of the Lodge by George Kuhl, the principal of the Meadowcroft companies, and Lily Sommerville, Senior Vice-President for Operations for the Meadowcroft Group. This occurred during a meeting in March 1996. At this meeting Kuhl and Sommerville advised Tablada that she would be kept on as administrator of Livingston Lodge, and that all of the employees would be retained. She was also told at that time that Nutra 2000 would be taking over the running of the lodge and the employ of the staff.

12. Corporate documents filed at the hearing and reviewed in evidence by corporate counsel for Meadowcroft Holdings Inc. disclose that the sale of the Lodge closed on May 7th or 8th, 1996. The sale and the structuring of the ownership and management of the Lodge was quite complex, but can be summarized as follows for the purposes of this case:

- (i) an Agreement of Purchase and Sale was executed on February 20, 1996,

providing for the sale of Livingston Lodge from 471374 Ontario Limited to Meadowcroft Holdings Inc., in trust and without personal liability. The date of closing is specified as April 30, 1996. Article 10.1 of the agreement requires Meadowcroft Holdings Inc. to offer employment on comparable terms and conditions to all of the employees of the Lodge, effective the date of closing;

- (ii) Meadowcroft Holdings Inc., by its president, George Kuhl, directed the vendor to pass title to 1166067 Ontario Limited, a corporation which was created to hold that title. The deed was registered to 1166067 Ontario Limited on May 8, 1996;
- (iii) on the same day, 1166067 Ontario Limited entered into a Trust Agreement with Livingston Lodge Limited Partnership and Livingston Lodge GP Limited (the "GP" standing for "general partner"). This agreement gives the limited partnership a beneficial interest in the title to Livingston Lodge. The general partner, 1166067 Ontario Limited and the other limited partners which make up the limited partnership, had earlier entered into a Limited Partnership Agreement, dated April 24, 1996. This agreement provides, among other things, that the purpose of the limited partnership is to acquire beneficial title to Livingston Lodge and to own and operate it for the purposes of earning income, and potentially realizing capital appreciation. The general partner controls and has full responsibility for the business of the limited partnership, in accordance with the laws governing limited partnerships. George Kuhl is the president and secretary of the general partner. The limited partnership and the general partner have their principal offices care of the Meadowcroft Group;
- (iv) both the limited partnership and the general partner are owned by a group of investors which includes George Kuhl. Kuhl organized the purchase and financing of Livingston Lodge, and put together the group of investors. The George and Vivian Kuhl Family Trust, which is controlled by George Kuhl, owns 50% of the shares in the general partner and the partnership units in the limited partnership (although the family trust granted to Rabbi Morton Green, allegedly as a charitable donation, a participation interest in 10% of its units in the limited partnership). 1166067 Ontario Limited is owned by the Livingston Lodge Limited Partnership; George Kuhl is the sole director, president and secretary of the corporation;
- (v) the Livingston Lodge Limited Partnership, by its general partner, entered into a Management Agreement with the Meadowcroft Group Limited ("the Meadowcroft Group") on May 1, 1996. The agreement provides for the appointment of the Meadowcroft Group as manager of Livingston Lodge, with the sole and exclusive right to manage and operate the business for and on behalf of the owner for a five year term. The agreement provides that the Meadowcroft Group may employ on-site managerial, contract consulting and supervisory staff for the Lodge, that such staff shall report directly to the manager, and that staff shall be remunerated from the gross revenue of the business as an operating

expense. It also provides, in Article 3.03(a), that all personnel “rendering direct employment services to the Business” are employees of the owner or the contracting employment service. Article 3.03(d) permits the Meadowcroft Group to enter into service contracts for the supply of personnel for the Lodge. Among the duties of the manager listed in the agreement is negotiation with any labour union representing employees at the Lodge, including retaining a labour lawyer to represent the owner in labour negotiations. Other interesting provisions in the agreement relate to the role of George Kuhl and his companies in the management of the business: Article 10.04(b) provides that the contract with the Meadowcroft Group may be terminated on 30 days notice if Kuhl is no longer made available by the Meadowcroft Group to supervise and direct its services under the agreement; and, Article 14.01 provides that the Meadowcroft Group may not assign the agreement except to a corporation which is controlled by Kuhl and subject to him continuing to be actively involved in the day to day affairs of the new manager. George Kuhl signed the Management Agreement for both the limited partnership and the Meadowcroft Group. He is the president and secretary of the Meadowcroft Group Limited, his family trust owns all of the shares in the corporation, and he and his wife are the sole directors.

13. The net effect of all of these complex corporate arrangements, which are well documented in the numerous exhibits filed with the Board, was that a group of investors including George Kuhl and making up the Livingston Lodge Limited Partnership, assumed ownership of Livingston Lodge early in May 1996. Management of the Lodge was then assigned to the Meadowcroft Group Limited by way of a management agreement. The Meadowcroft Group is in the business of managing retirement homes. It manages operations directly at 17 or 18 homes, and has contractors in place in 6 or 7 other locations. It provides management services to homes owned by other Meadowcroft companies, to homes owned by limited partnerships formed by George Kuhl such as the Livingston Lodge Limited Partnership, and also on contract to unrelated owners.

14. In the case of Livingston Lodge, the Meadowcroft Group purported to contract out the responsibility for the employment of all of the staff of the Lodge to Fred Timman and Nutra 2000 sometime after the closing in May 1996. Evidence about these arrangements came almost entirely from Fred Timman, as the witnesses who testified on behalf of the various Meadowcroft entities were not involved directly in the making of arrangements with Timman, and had no direct knowledge of the terms of the contract with him.

15. Timman testified that he was contacted by Lily Sommerville of the Meadowcroft Group sometime in May 1996, to discuss whether or not he was interested in taking over and directing all of the staff at the Lodge. The deal that was offered was that he would proceed to pay staff members through his own payroll system, on a “cost-plus” basis: the Meadowcroft Group would pay to him the payroll costs plus a management fee; all other expenses of the Lodge, such as food and supplies, would be paid directly by the Meadowcroft Group. Timman already had three other of these “total management” contracts at other retirement homes operated by the Meadowcroft Group.

16. Timman recalled that Sommerville first made this offer in a telephone call, and that they later met to finalize the deal. He testified on direct examination that during this meeting Sommerville told him that the Meadowcroft Group was interested in staff staying on at the Lodge as it was important for the residents to see familiar faces. On cross-examination he claimed that this was never said directly by Sommerville, but that he understood from other things that she said that Meadowcroft wanted the

staff to be retained, which he too thought was a good idea. He agreed that it was clear to him that the Meadowcroft Group was concerned that there be a smooth transition, and that the welfare of the residents not suffer.

17. Timman also testified that Sommerville provided to him at this meeting a budget, which he said was "in staff hours only at that time". He explained that this meant that he had no financial picture of the operations of the Lodge, but knew the number of staff hours which were being worked by the persons in the various classifications.

18. Armed with this information, Timman entered into an oral contract with the Meadowcroft Group for Nutra 2000 to employ all of the staff of the Lodge, including the administrator Nadia Tablada, in the way described above. The contract was for a one year trial period. The fee paid to Timman was approximately \$900 per month; he could not identify the precise figure as what was negotiated was an increase in the fee paid to him for the management of all four facilities to \$3000.00 per month.

19. There does not appear to have been any announcement to the staff that they were now employed by Nutra 2000, and no explanation of the management and ownership structure was ever provided. All of the staff were continued in employment at the same pay rates they had previously received, including Tablada, whose salary Timman described as "set" prior to the takeover. Timman testified that his deal with the Meadowcroft Group was effective June 17, 1996, and no witness from the Meadowcroft Group testified that this assertion was incorrect. There was therefore no explanation provided as to who exactly was in charge of the facility, and who paid the staff, during the period between May 8 and June 17, 1996. It would appear from the documents filed, however, that the Meadowcroft Group had legal control of the workplace during that period, although the terms of its management contract provide that the owner, the Livingston Lodge Limited Partnership, was the legal employer of the employees. Interestingly, operations at the Lodge seem to have continued on as usual during this period, with Nadia Tablada running it on a day-to-day basis, as she had before the change in ownership, and continues to do under Fred Timman and Nutra 2000.

20. Both Timman and Tablada described in their evidence the day-to-day running of the Lodge, and there was no real dispute that Tablada, as the only on-site manager, essentially runs the operation. Timman has a home office and a mailing address, maintains no office at the Lodge, and visits all of the various facilities where he (through the guise of three different companies) provides management services on an irregular basis through the week. Tablada and the other managers at the facility, which include a Food Services Manager and Director of Nursing, have full authority to make decisions about most matters affecting the Lodge, including hiring and firing staff other than managerial staff, about which Timman is consulted.

21. Timman was asked whether or not he had the discretion to terminate Tablada, and admitted that he would have to "make a case" for her dismissal to the Meadowcroft Group, and explain his reasons. With respect to other hirings and firings, however, he claimed that the Meadowcroft Group has no involvement. Only one employee, the Food Services Manager, has been terminated since the sale of the Lodge, and the Board heard evidence about the making of that decision. Timman introduced the incident involving the Food Services Manager in the context of questions about the extent to which he has any discretion over the budgets at the Lodge. He said that Debbie Souza, the second in command in the finance department at the Meadowcroft Group, called him to say that food costs were "a little out of whack", and that he investigated this complaint, and subsequently terminated the Food Services Manager. When questioned further about this incident, Timman said that there were a number of other reasons for his and Tablada's decision to terminate the employee. Timman later testified that the Meadowcroft Group would never direct him to fire someone, but that when a complaint comes from

Meadowcroft about something that affects revenues he can “read between the lines” and would “know I have to do something”.

22. The employee payroll process was described in some detail. Employees enter their hours on time sheets, and these hours are tabulated by the office manager at Livingston Lodge. These hours are then transferred by modem to Timman’s computer. He compares them to the budget of hours provided to him by the Meadowcroft Group, resolves any inconsistencies through contact with the Lodge, and then processes the payroll using payroll software. This is conveyed to the Toronto Dominion Bank’s payroll service, which makes up a payroll register showing all of the cheques which are to be issued. Using this information, Timman prepares an invoice for the total amount of the payroll, and submits this to the Meadowcroft Group, which issues him a cheque. Not until he deposits this cheque to cover the amount of the payroll does the TD payroll service issue cheques made out to the employees, which are then delivered to the Lodge for distribution. All other expenses at the Lodge are paid directly by the Meadowcroft Group; bills for food, supplies and services are sent to them to be paid.

23. Timman was examined about the extent of his discretion to change the complement of staff at the Lodge or to alter their pay or benefits. It was clear from his evidence that he cannot increase the total complement of staff if this increases the number of hours being worked, without the approval of the Meadowcroft Group. Similarly, he cannot give an increase in pay or benefits if it increases the total amount of the payroll; the only way he could give an employee a raise without the consent of the Meadowcroft Group would be to reduce the amount of money paid to other employees, or pay more per hour for fewer hours.

24. Much of the remaining evidence given by Timman, Tablada, and Marlene Toons, the only witness from the Meadowcroft Group who has had any direct dealings with Livingston Lodge, focused on the nature and extent of the contacts between management and staff at the Lodge, and management and staff at the Meadowcroft Group. In the interests of brevity, these contacts can be summarized as follows:

- (i) *Daily Investor Reports*: Tablada, or the nurse-in-charge in her absence, is responsible for the faxing of reports called “Investor Reports” to the offices of the Meadowcroft Group, twice daily on weekdays and once a day on weekends. The Investors Report is done on a form headed “Investors Report - Retirement Home Division” and is used at all of the facilities in which George Kuhl and/or the Meadowcroft Group has an interest. The report requires information on: the census, both actual and expected; the day’s bank deposit and balance; “marketing”, including tours and admissions; planned discharges; incidents, accidents, hospital admissions or discharges; repairs, maintenance and/or emergencies not budgeted for and over \$100.00; family and resident feedback; any use of nursing agencies; visits or inspections from government or other agencies; follow-up action on past due receivables; and “additional comments”. There was lengthy commentary by the various witnesses about the purpose and significance of the Investors Reports, which I will not review at any length. Suffice it to say that the reports provide regular (twice daily) information to the Meadowcroft Group about how Livingston Lodge is operating, and would certainly draw to its attention any occurrence which was out of the ordinary, or any development at the Lodge which was likely to impact on its success, such as the departure of, or complaints from, residents. The reports also permit the Meadowcroft Group to keep a close eye on the spending of any discretionary funds, in

addition to its control over the main budget items such as food, personnel and other supplies. It was not entirely clear to whom the reports are provided, but certainly George Kuhl and other key members of his management team, including Marlene Toons, receive copies;

- (ii) *Weekly Inspection Reports/Monthly Inspections*: Tablada also completes a “Manager’s Weekly Inspection Report”, which is faxed weekly to the Meadowcroft Group. This form requires her to note any deficiencies apparent on a floor-by-floor physical inspection of the premises, such as doors needing to be cleaned, areas to be vacuumed or swept, or minor repairs required. She testified that she usually takes steps to remedy any such deficiencies as soon as she observes them, and is therefore able to advise the Meadowcroft Group almost simultaneously that the problems have been resolved. Marlene Toons also attends at the Lodge every month and does her own physical inspection of the premises. Her observations are noted by Tablada, and are also included in a report which she faxes to the Meadowcroft Group, leaving a copy at the Lodge so that any action she requests can be achieved immediately. Deficiencies observed by either Tablada or Toons are dealt with immediately by Tablada giving direction to the staff; Timman is provided with copies of the reports from the Meadowcroft Group but he expects Tablada to go ahead and deal with any problems without further direction. Similarly, Tablada generally deals with other directions received from the Meadowcroft Group from time to time, usually by fax, providing a copy to Timman but not waiting for his approval. Actions taken to remedy any deficiencies are confirmed in writing to the Meadowcroft Group;
- (iii) *Maintenance*: Bruce Carpenter, who did not testify, is a maintenance contractor retained by the Meadowcroft Group to do work, and retain contractors to do work, at various of its facilities. The on-site maintenance employee at Livingston Lodge is required to contact him if any major repairs are needed, in order that Carpenter can retain an appropriate contractor, do the work himself, or, presumably, authorize the employee to do the work. Carpenter did not testify, and no-one else who testified seemed to have a very clear understanding of the nature of his retainer, or to what extent the Lodge is required to use his services. However, it was not disputed that he does work from time to time at the Lodge, or that he is consulted when repairs are required;
- (iv) *Marketing*: The Meadowcroft Group assigned one of its marketing employees, Sarah Howe, responsibility for finding new residents for the Lodge and “signing them up”. Previously, this marketing was done by Tablada and the Director of Care, and it is still done to some extent by Tablada as she is at the Lodge every day, while Howe attends irregularly when she has tours or meetings scheduled. This means that both Tablada and Howe have regular contact with discharge planners at local hospitals and with other community agencies, and do tours of the facility for potential residents and their families, although Tablada does not have as much regular involvement in these activities as Howe. When Howe attends at the facility to do tours she may have some contact with staff, although she testified that she is careful to direct any comments she may

have about the condition of the premises to Tablada, and that she never directs staff. Howe is an R.N., and she does the initial assessment of residents, identifying what level of care is required and what services they request, including what nursing care will be needed;

- (v) *Money*: The movement of funds from the Meadowcroft Group is referenced above in the description of the payroll process. There is also regular contact between the office staff and Tablada, and the accounting personnel at the Meadowcroft Group, as invoices are sent for payment, discretionary expenses are approved, etc.;
- (vi) *Other attendances by Meadowcroft staff*: George Kuhl and his son both attended at the Lodge fairly regularly during the summer and fall of 1996, when the Lodge was being renovated. Michael Kuhl, who is a full-time student, was responsible for supervising the contractors who were working on the job, and George Kuhl attended on occasion to observe the progress of the renovation. They sometimes left directions for the contractors, which might be left with Tablada. As will be discussed below, George Kuhl did not testify about his reasons for attending at the facility, or his conduct while there, but several other witnesses claimed that he was not involved in the direction of staff. The Vice-president of marketing for the Meadowcroft Group, and other staff from their offices, also attended at an open house held when the renovations were complete. Other than that, and the attendances detailed above, staff from the Meadowcroft Group do not attend regularly at the Lodge and limit their communications to phone and fax.

25. There was little evidence called about the other entities named as responding parties to the applications. Kathy Tadres, the Director of Human Resources and Labour Relations for the Meadowcroft Group, testified that she had been advised that Meadowcroft Management Holdings Inc. is the parent company of Meadowcroft Holdings Inc.. She had no other knowledge of its activities or its relationship to the other corporate entities or to Livingston Lodge. Corporate counsel confirmed that Meadowcroft Management Holdings Inc. holds all the shares in Meadowcroft Holdings Inc.. Both Tadres and corporate counsel for Meadowcroft Holdings Inc. testified that they were unaware of any company operated by George Kuhl carrying on business as the Meadowcroft Health Care Management Group. Tadres said that she believed that the Meadowcroft General Partnership might exist and undertook to inquire and advise as to its status, but no further evidence concerning this entity was entered.

26. George Kuhl, who is named personally as a responding party, did not testify, but evidence was entered in documentary form, and confirmed in testimony by his corporate counsel, that established him as the principal in the Meadowcroft Group Limited and 1166067 Ontario Limited, which were named as responding parties, as well as the Livingston Lodge Limited Partnership and General Partner. His son and Nadia Tablada testified second-hand about the extent of his involvement in the day-to-day running of the retirement home.

THE DECISION

27. Given the length of this decision I will not canvass in detail the arguments made by counsel but will instead deal with their submissions briefly while setting out my factual findings and legal conclusions.

28. The four applications before me raise two separate issues, argued in the alternative:

- (a) who is the employer of the employees in the two proposed bargaining units, Nutra 2000 or one or more of the Meadowcroft entities?
- (b) should Nutra 2000 and one or more of the various Meadowcroft entities be declared to constitute a single employer for the purposes of the Act?

29. Counsel for the applicant proposed that the Board deal first and foremost with the issue of whether or not the named entities are related employers under common control and direction within the meaning of section 1(4) of the Act. In some of the cases submitted by the parties the Board has first considered which party exercises fundamental control over the employees and thereby determined who is the employer, without considering the need for a related employer declaration (see for example *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931 (“*Kennedy Lodge*”). However, in *Brantwood Manor Nursing Home Limited*, [1986] OLRB Rep. Jan. 9 (“*Brantwood Manor*”) the Board first addressed the questions relating to the application of section 1(4), making the following comments which seem applicable to the present case:

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101. When the application of subsection 1(4) is in issue, the Board is concerned with the definition or potential redefinition of a continuing collective bargaining relationship, not with the assignment of vicarious liability for an occasion of negligence, nor solely with the interpretation and application of the language of a collective agreement. If there is a serious debate over which of two entities is the employer of persons who are conceded to be someone’s employees, that will be because some of the important attributes of an employer can be seen in each of them. When each of the entities appear to have a real stake in and influence on matters of relevance to the labour relations of employees in a bargaining unit, then even from their perspective it may make sense to treat them both as the employer for labour relations purposes than to choose between them and designate one as employer for labour relations purposes to the exclusion of the other, who might for other purposes be treated as employer. The possibility that a choice is unnecessary or inappropriate should be considered before the choice is made.

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30. Counsel for the other parties did not make specific submissions about this issue, but they each directed their arguments almost exclusively to the application of section 1(4). In these circumstances, and for the reasons offered in *Brantwood Manor*, *supra*, I will proceed first to consider whether or not the requirements for a declaration under section 1(4) have been made out, and, if so, whether in the circumstances of this case the Board should grant a declaration under that section.

31. Section 1(4) of the Act provides as follows:

1. • • •

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

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More than one corporation or individual carrying on related activities or businesses

32. There can be no dispute that more than one entity is involved in the operation of Livingston Lodge, and the parties did not seriously dispute that they are engaged in related activities or businesses. The evidence entered by the Meadowcroft entities, who offered a joint defence, reveals clearly that the Meadowcroft Group Limited, Meadowcroft Holdings Inc., 1166067 Ontario Limited and George Kuhl were all involved in the acquisition of and/or operation of the retirement home, and all of these entities are under the control of George Kuhl. Indeed, it was not seriously disputed that these Meadowcroft companies carry on their activities under his common control and direction.

33. The heart of the dispute between the parties is the claim by the unions that all of the Meadowcroft entities named carry on related activities or businesses with Nutra 2000, and that these activities are carried on under common control and direction. The evidence established clearly that the activities of Meadowcroft and Nutra 2000 in respect of Livingston Lodge are related within the meaning of the Act. The general theory of the case which was advanced by counsel for Meadowcroft was that his clients run “the property”, while Nutra 2000 runs “the people”. These two elements of the business are nonetheless inextricably related, as the value of the property lies in its capacity to earn income through its operations as a retirement home. The documents relating to the limited partnership and general partner establish clearly that the goal of the investors is to realize profit through the operation of Livingston Lodge and possible as well through its eventual sale, at which time the value of the property will be impacted by its success as a retirement home.

34. Witness after witness confirmed this important connection between the activities of the owners and those of Nutra 2000, the alleged employer of the persons who operate the retirement home on a day-to-day basis: “if you keep the residents happy, you keep the census up, and keep the profits coming”. It cannot be disputed that the efforts of the staff who prepare and serve meals, clean the premises, provide nursing care and other support in the activities of daily living, and plan and execute various activities for the residents, are critical in attracting and maintaining a satisfied clientele for the Lodge. At the same time, the building must be well-maintained and outfitted, an element of the operation for which the Meadowcroft Group clearly retains responsibility, and the other Meadowcroft entities were involved in the funding and purchase of the property itself. On the facts of this case I have no difficulty concluding that Nutra 2000, the Meadowcroft Group Limited, 1166067 Ontario Limited, Meadowcroft Holdings Inc. and George Kuhl are engaged in related activities or businesses.

Common control or direction

35. This integration of goals and activities also goes to establish that the activities of these entities are under common control and direction, the element of section 1(4) which was clearly disputed by the responding parties. In *Diamond Taxicab Association (Toronto) Limited*, [1995] OLRB Rep. June 753 (“*Diamond Taxicab*”), the Board observes at paragraph 59 that common direction or control is not limited to common ownership or principals, and may be applied in sub-contracting situations. The Board goes on to note that:

“...Even where the corporate vehicles may have separate spheres of control in which they are each their own masters, the functional interdependence of separately controlled activities may lead to a conclusion of common control or direction over the activities as a whole.”

The Board makes a similar reference to functional and economic integration in *J.H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176 at paragraph 21.

36. This is a case which raises squarely the issue of sub-contracting which has been considered in previous Board decisions under section 1(4) of the Act, although there are more layers of delegation

here than in many of the earlier cases. Sub-contracting cases require a different analysis of the issues under section 1(4) than many other cases as there is generally no allegation of common ownership or intersecting corporate structures. Instead, one corporate entity chooses to delegate some part of its operations to a separate company or person, often including the employment of persons performing work in those operations.

37. Where sub-contracting attracts an application for a related employer declaration the Board is not concerned with whether or not the sub-contracting is permissible; that is an issue which may arise in another forum if some legal restriction on sub-contracts such as a contractual prohibition is in existence, but which is not part of the question for the Board. Instead the Board is concerned with what legal and labour relations consequences flow from such a “delegation” if the activities in which persons are employed by the sub-contractor remain under common control or direction. This point is made by the Board at paragraph 113 of the decision in *Brantwood Manor*.

38. An important consideration in the sub-contracting cases is what part of the operations of the original company is contracted out. Activities which are collateral or peripheral to the company’s business can be relinquished more easily than the core activity of a business, and are therefore much less likely to be perceived as remaining under common control or direction. However, where the core activity of a business is sub-contracted it is difficult to perceive any separation between the purposes and functions of the two entities. These points are made in *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931 at paragraph 56.

39. In the present case the owners of Livingston Lodge have contracted management of its operations to the Meadowcroft Group, a company which is in the business of managing retirement homes and which has close corporate ties with the owners through George Kuhl, who is the principal investor and the directing mind of all of the Meadowcroft companies. The Meadowcroft Group has in turn purported to contract with Nutra 2000 for the management of *all* of the staff at the retirement home, including the administrator who is the on-site manager of all of its operations. This wholesale sub-contracting is on a much broader scale than in any of the cases cited by the parties, except perhaps *J.H. Normick, supra*, where the company contracted all of its operations, although only in a particular area, to another operator.

40. In both *Kennedy Lodge, supra*, and *Brantwood Manor, supra*, the Board focused on the provision of nursing care to the residents of these nursing homes as being the core activity. In the present case, counsel for Meadowcroft argued that nursing could not be the core activity of the enterprise as Livingston Lodge is a retirement home and not a nursing home, and is therefore covered by different legislation which does not require the provision of “active nursing care”. Whatever the legislative mandate, Livingston Lodge does advertise and appears to provide to its residents “nursing”, “nursing supervision”, “medication administration”, “exemplary health care” and “professional 24-hour health care”. In any event, the terms of its leases with residents include the provision of meals, housekeeping, laundry, recreational and social activities and assistance with the activities of daily living including dressing, personal hygiene and bathing. All of these activities, and the regular maintenance of the facility, are alleged to have been sub-contracted to Nutra 2000. In these circumstances, it must be said that the core activities of the retirement home have been contracted out.

41. In determining the extent to which Meadowcroft and/or the owners of Livingston Lodge have maintained control over the operations of the retirement home, particularly around labour relations matters, I have carefully reviewed the facts detailed above. All counsel directed significant argument to the question of whether or not the facts established that Meadowcroft dictated to Nutra 2000 the complement of staff which must be hired and the terms and conditions of their employment. On the facts outlined above, I have no difficulty in concluding that it did. While Fred Timman attempted to

obfuscate on this point, his testimony points inevitably to the conclusion that he inherited a full complement of staff when he entered into the contract with Meadowcroft. The evidence of Tablada that she was told long before Timman made the deal that she and all of the staff would be retained is also significant, as is the fact that Kuhl and Sommerville met with her directly. Not surprisingly, they seem to have wanted to “check out” the person who would be running the operation on a day-to-day basis. As in *J.H. Normick, supra*, Nutra 2000 was presented with a “ready-made labour force” when it accepted the contract with Meadowcroft.

42. Counsel for the responding parties also asserted that Timman had some significant discretion in setting the terms and conditions of employment of his new employees, despite the strict control Meadowcroft retains over the budget. Interestingly, Timman testified that the first “budget” he was given by Meadowcroft was in hours; with the staff, their classifications, and the hours they were to work fixed by Meadowcroft it is difficult to see where Nutra 2000 could possibly have much influence over the terms of their employment. Even after Timman began to work with a budget set in dollars, the most flexibility he could claim was the ability to give more of the salary dollars to a particular person, by reducing the amount paid to another, or by reducing hours.

43. Timman has the power to hire, fire and discipline, and he schedules employees within the limitations established by the budget set by Meadowcroft, but he essentially delegates these functions to Tablada and the other managers, except on the few occasions when managerial personnel are involved. His power to hire or fire is restricted by the complement established by Meadowcroft; if changes in the demands made by residents results in the need for additional staffing, for example, he needs to make a case for such an increase to Meadowcroft. His authority is really no different than that of a senior manager, in the same way that the Board in *J.H. Normick, supra* concluded at paragraph 20 that the sub-contractor’s ability to hire replacements put him on no higher plane than that of a Normick manager.

44. There was some testimony about Timman having put in place his own policies and procedures, but no specifics were provided other than compliance with the minimum standards established by the *Employment Standards Act*. It certainly cannot be said that he has put his “imprint” on the workplace in any significant way; Tablada runs the operation day-to-day in essentially the same way she did when it was run by Arbor Living Centres, other than the changes in marketing strategy implemented by Meadowcroft and the new requirement to report to them on an ongoing basis.

45. The daily, weekly and monthly on-site reporting to Meadowcroft was characterized by its counsel as nothing more than the provision of information to the investors, in order that they are assured that their interests in the property are being protected. As noted above, their interests were identified as maintaining a high census and thereby making a profit. Surely, if Meadowcroft is charged with protecting their interests, as the management agreement seems clearly to provide, there must be some purpose in collecting this information; there must be some intention to take some action if conditions at the home are inconsistent with maintaining a high census and making money. The interventions that have so far been common have related to the routine maintenance of the physical plant; no doubt it is hard to recruit residents if a facility is in poor repair. I have no doubt, however, that the questions on the reports that relate to resident care such as complaints from residents, reasons for their departure, and unusual occurrences, are there for a reason and would result in some direction from Meadowcroft if they were concerned about the possible impact of any of these things upon income for the facility.

46. It is also undeniable that Meadowcroft’s control over the budget has, and will continue to have, an impact on Timman’s dealings with “his” staff in areas other than the setting of terms of employment. The termination of the food manager was a concrete example of the nexus between Meadowcroft’s interests and Timman’s obligations as they impact on labour relations matters.

47. Counsel for Meadowcroft asserted that all of these examples of control over the operations of Livingston Lodge by his client were no more than commercial control over its contract with Nutra 2000. He analogized the arrangements between the parties in the present case to those described in the *City of Stratford*, [1985] OLRB Rep. June 923, and in *Caressant Care Nursing Home of Canada Limited*, [1985] OLRB Rep. Jan. 50. The distinctions between the facts in those two cases and those in the present matter are too numerous to enumerate. In both instances the Board concluded that the control over the operations of the sub-contractor retained under the terms of the contract with the original company was no more than any customer could expect to retain in entering into a contract for the provision of services. I am satisfied that in the present case the control exercised by Meadowcroft goes far beyond this notion of “commercial control”.

48. Other elements of the contractual arrangements between the parties are instructive in this regard. The absence of any written agreement, given the significance of the responsibilities allegedly delegated to Nutra 2000, is troubling, particularly in light of the detailed management agreement negotiated by Meadowcroft with the owners of the property. Either the witness was being deliberately vague, or the oral agreement which Timman testified about seems to have dealt with almost none of the arrangements one would expect would be required in order to structure such a relationship, and as noted above no-one who was involved in reaching the agreement on behalf of Meadowcroft testified in these proceedings. Counsel for the union suggested that I should construe this surprising absence of detailed contractual terms and the failure to reduce anything to writing as a deliberate attempt by the parties to avoid the careful scrutiny of their arrangements undertaken by the Board in *Brantwood Manor, supra*. Whatever the reason for the apparently casual nature of the arrangements between the responding parties, the lack of detailed terms certainly does not immunize their arrangements from examination.

49. In *J.H. Normick, supra*, the Board considered the fact that either party could terminate their agreement on 30 days notice and stated that “...(h)aving regard to the economic and organization imbalance between Normick Inc. and Mr. Turgeon, the power of Normick to terminate on short notice is a compelling indicia of economic control”. Counsel for the responding parties both argued that Timman was not in an inferior position in the bargain struck with Meadowcroft in the same way that Turgeon was overpowered by Normick, but I see important analogies in their situations. Both were minor players in the same business as the company sub-contracting to them, and both were economically dependent on their client to a large degree (recall that all of Timman’s “total service” contracts are at Meadowcroft owned or managed properties).

50. Both the quantum of the remuneration paid to Timman for his services as the purported employer of the employees of Livingston Lodge, and the financial controls maintained by Meadowcroft mean that Timman assumes no risks, but also has no opportunity to increase his profit through his involvement at Livingston Lodge. It also cannot be said he “bears the burden of remuneration” of the employees, a factor which is considered by the Board in determining who is the employer (see *York Condominium Corporation No. 77*, [1977] OLRB Rep. Oct. 642). Timman’s involvement in the payment of employees is nothing more than that of a paymaster, as he doesn’t advance any of his own funds to the employees at any time; indeed, he does nothing more than direct Meadowcroft’s funds to the employees with the assistance of a payroll service.

51. Having regard to all of the elements of the relationship between the responding parties reviewed above, and to the facts about the involvement of Meadowcroft at the retirement home which were disclosed by the evidence, I have concluded that Livingston Lodge is under the common control and direction of Meadowcroft and Nutra 2000. Accordingly, all of the prerequisites for a section 1(4) declaration are present and I must decide whether it is appropriate in the circumstances of this case to exercise the Board’s discretion to grant the relief requested by the unions.

Exercise of discretion

52. The Board has stated in numerous cases that it will exercise its discretion to make a declaration under section 1(4) where it finds the presence of a mischief of a sort to which the enactment of the section was directed. In making this determination, the Board will consider many of the same facts as are relevant to the issues reviewed above, as the questions are closely related. In fact, some Board decisions do not distinguish between them.

53. In *Etobicoke Public Library Board*, [1989] OLRB Rep. Sept. 935, which was quoted with approval in *Diamond Taxicab*, *supra*, at paragraph 56, the Board said that section 1(4) is designed:

- (a) to preserve or protect from artificial erosion the bargaining rights of the union;
- (b) to create or preserve viable bargaining structures, and
- (c) to ensure direct dealings between a bargaining agent and the entity with real economic power over the employees.

54. The Board in *Diamond Taxicab*, *supra* went on to summarize the goals of the section as follows:

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The Board's caselaw reflects the fact that section 1(4) provides the flexibility to make collective bargaining viable in the face of a spectrum of commercial and organizational arrangements through which business activities are carried on and work is performed. Among other things, it may stabilize the labour relationship by facilitating bargaining rights which flow through sequential or contemporaneous corporate structures. In some circumstances, it may prevent negotiations from turning into an elaborate fiction by bringing the real locus of power into the appropriate forum. Where employer functions are distributed among different legal entities, section 1(4) may permit their assembly so that meaningful collective bargaining can be carried on.

• • •

55. Counsel for the unions argued that there is a need in the present case for the Board to issue a declaration under section 1(4) to ensure that these goals are met: that viable bargaining structures are created at the outset of these collective bargaining relationships which involve the entities with real economic power over the employees.

56. The evidence establishes clearly that on its own Nutra 2000 would have virtually no power to bargain with either union over terms and conditions of employment, given the strict controls imposed by Meadowcroft over many aspects of the workplace, and in particular over the finances. Timman testified that he could go to Meadowcroft with bargaining proposals to seek a change in the budget, only confirming who has the real economic power over the employees at Livingston Lodge. This would be much like requiring the unions to bargain with a manager who had no authority to bind the employer, and who could be terminated at any time if he were to pass on a proposal that did not meet with favour, a bargaining structure which cannot be considered viable or on a sound footing.

57. The Board considered a similar situation in *J.H. Normick*, *supra*, and stated at paragraph 22 that:

22. ... In this case the relationship between Turgeon and Normick Inc. is such that if the Board does not exercise its discretion in favour of issuing a section 1(4) declaration the employer party to the employment relationship (if one exists) and to the collective

bargaining structure which will result if the union is certified, will be the employer in name only. If the Board does not issue a declaration, the entity possessing both economic and de facto operational control would not have a legal relationship within the ambit of *The Labour Relations Act* with those employees who are the subject of its control. The potential labour relations weakness of this result is self-evident. Having regard to all of the foregoing the Board is of the view that it should make a section 1(4) declaration in this case in order to reflect in law the economic and organization reality and thereby put the labour relations of these related activities on a sound footing. ...

58. Counsel for the responding parties argued that there is no need for a declaration in this case, as Nutra 2000 stands ready to assume its responsibilities as the employer. Counsel for Meadowcroft also asserted that the union's emphasis on the need to have the real locus of economic power at the bargaining table would in fact result in an improper use of the Board's powers, as it is nothing more than an attempt to reach a "deep pocket". It is certainly relevant to both the finding that the enterprise is under common control and direction and to the Board's exercise of discretion that Timman has absolutely no budgetary discretion and theoretically only his \$900 per month fee to allocate to any collective bargaining concessions which might result in some cost. However, the Board would not have found that common control existed, and would not contemplate making a declaration, if Nutra 2000 was truly an independent operation which just happened to generate little profit. Instead, the facts in this case disclose that Nutra 2000 is little more than a payroll service, or a manager who happens to be incorporated, and therefore has no real economic power over the employees and little contribution, financial or otherwise, to make in bargaining, no matter how willing Timman may be to come to the table.

59. In *Kennedy Lodge, supra*, the Board also considered the fact that the sole purpose of the sub-contract was to avoid unionization in determining to issue a declaration (see paragraph 57). Counsel for Meadowcroft argued that the Board in this case should take into account that no such anti-union animus has been established.

60. It is not a prerequisite for the exercise of the Board's discretion under section 1(4) that anti-union animus be found. At the same time, it is also not clear that Meadowcroft did have a legitimate purpose, other than to avoid responsibility as the employer, in collective bargaining or simply under provincial law, in deciding to delegate the employment function to Nutra 2000. The complex corporate structures established around the sale and the holding of the property were explained by corporate counsel as having been driven by tax considerations. The decision by the investor's group to retain the Meadowcroft Group to manage the retirement home is also transparent, as the owners were clearly not in the business of running such homes and would require management expertise. But given that the Meadowcroft Group is in the business of managing retirement homes, and having regard to the provisions of the agreement between Meadowcroft and the investors which emphasize the importance of George Kuhl's involvement in the day-to-day running of the home, the decision to then sub-contract to Nutra 2000 is surprising.

61. The evidence on this issue was wholly unsatisfactory. Kathy Tadres, the Meadowcroft Group's manager of human resources, was not in the employ of the company when the decision to retain Nutra 2000 was made, but she speculated that the decision was likely motivated by a lack of resources within the Meadowcroft Group to manage the facility. She testified that the Meadowcroft Group runs without a sub-contractor approximately 17 or 18 retirement homes, and manages with a contractor in place a further 6 or 7. No more detail was provided as to how Meadowcroft decides which facility to set up in which way, and no-one who was actually involved in the decision to retain Timman testified. During argument I asked counsel for Meadowcroft why the Meadowcroft Group would enter into a management contract like the one entered into evidence, which required Kuhl's involvement and strictly limited the ability to assign the agreement, if it did not have the resources to fulfill its terms, but did not get a satisfactory answer.

62. Given that Tablada was maintained as the administrator of the home, along with all the other staff including managers, and that other expertise, such as marketing, maintenance consulting and budgeting, is provided directly by the Meadowcroft Group, it is not clear what business benefit is derived from the arrangement with Nutra 2000, other than distancing the Meadowcroft entities and the investors from employment obligations. I remain unsatisfied with the evidence about the purpose of the transfer to Timman, but I can certainly conclude on the facts which were heard that this is not a case like many where the Board has concluded that the employer was not really in the business of doing the particular discrete, collateral activity that was contracted out, and/or the employer had a good commercial reason to contract out the work like saving money. In the absence of adequate testimony on these issues, I am prepared to draw an adverse inference on the issue of the purpose of the sub-contracting. On its own, these concerns would not lead me to grant a declaration, but at the same time counsel for the employer cannot rely upon the absence of any improper motive to support its position that a declaration should not issue.

63. For all of these reasons, I am satisfied that the Board should issue a declaration under section 1(4) in order to ensure that collective bargaining at Livingston Lodge has a stable foundation, and that the bargaining agents are able to engage in direct dealings with the entity with real economic power over the employees in the bargaining units.

Scope of the declaration

64. Given the number of responding parties named in the applications, and the numerous other corporate entities which were the subject of the evidence, it is necessary to give some careful consideration to the scope of the declaration to be granted.

65. I have no difficulty in concluding that 1107989 Ontario Limited c.o.b. as Nutra 2000 and the Meadowcroft Group Limited should be declared one employer for the purposes of the Act. As noted above, the evidence before me also establishes that several of the Meadowcroft entities, including Meadowcroft Holdings Inc. and 1166067 Ontario Limited, are under the common control and direction of George Kuhl who is also the principal of the Meadowcroft Group Limited. There may be some purpose in declaring 1166067 Ontario Limited to be a related employer to the Meadowcroft Group and Nutra 2000, as this corporation, while otherwise an empty shell, does retain the legal title to Livingston Lodge. However, I can see no reason to make a declaration with respect to Meadowcroft Holdings Inc. and Meadowcroft Management Holdings Inc.; the former was involved briefly in the acquisition of Livingston Lodge but the agreement of purchase and sale was transferred to 1166067 Ontario Limited before the deal was closed, and the latter is only a holding company.

66. The applications refer to a number of other business styles which one or more of these corporate entities are alleged to use, but about which no evidence was called other than the statements of corporate counsel and Tadres that they were unaware of a business called "Meadowcroft Health Care Management Group". There is no need to make any particular declarations respecting these business styles as they are caught by the rulings with respect to the actual corporate entities described in paragraph 65.

67. As described in paragraph 12, the actual owners of Livingston Lodge are a group of investors who have formed a limited partnership, the Livingston Lodge Limited Partnership, which has as its general partner a corporation called Livingston Lodge GP Limited. George Kuhl is the main investor in the group, and is the principal of the limited partnership, the general partner and of 1166067 Ontario Limited which holds legal title. These details about the complex corporate structure involved in the acquisition and holding of the property were not disclosed until, at the earliest, March 24, 1997, when counsel for Meadowcroft wrote to counsel for CUPE, with copies to the other parties, outlining the basic elements of the transactions and arrangements described in paragraph 12 of this decision.

Some of the corporate documents which were ultimately produced were provided to counsel at that time, others not until much later in the hearing.

68. The limited partnership and its general partner are not responding parties in this matter. After counsel to CUPE and ONA learned that they were in fact the owners of the property, through disclosure of documents and also examination of the corporate counsel called by Meadowcroft, there was some discussion about whether or not they should be permitted to add them as parties in this proceeding, or whether we should adjourn in order to permit the filing of further applications under section 1(4) of the Act. Either route would have required the parties to relitigate significant amounts of evidence already called.

69. Union counsel ultimately informed the Board and the other parties that it was not their intention at that time to initiate any proceedings against the limited partnership and general partner, and that they would instead proceed with the litigation already commenced, in the hopes that whatever remedy might be provided by the Board in this matter would suffice. In these circumstances, there can be no declaration against the Livingston Lodge Limited Partnership or Livingston Lodge G.P. Limited, despite the factual findings reviewed above.

70. The remaining responding party is George Kuhl. The unions argued that a declaration should issue establishing Kuhl as a related employer pursuant to the Act. They asked the Board to draw a negative inference from his failure to testify, and argued that as the only constant and presumably permanent element in the entire complex of corporate entities his inclusion is required in order to ensure a stable foundation for bargaining.

71. I have carefully considered the unions' request that Kuhl be declared to be one employer with the Meadowcroft Group, 1166067 Ontario Limited and Nutra 2000, but have decided not to issue a declaration which includes him as an individual (certainly he will be affected by the declarations in any event as principal of both of the included Meadowcroft entities). As noted above, I have concluded on the evidence put before me that all of the Meadowcroft entities about which evidence was heard (and the Livingston Lodge Limited Partnership and Livingston Lodge G.P. Limited) are under his control and direction. However, none of the activities relating to the operation of Livingston Lodge are carried on by Kuhl as a sole proprietor; in each case he has established a corporate vehicle through which to conduct his business.

72. Section 1(4) clearly contemplates a finding that an individual carries on related activities or businesses under common control or direction with other individuals or corporations, and the issuing of a declaration against such an individual. It is not clear, however, when the Board might issue a declaration against the principal of a company, either in addition to or instead of a declaration against the corporate entity he or she directs. No party cited and I am not aware of a case where such a declaration has been made. In any event, presuming without finding that the Board has the power to make a declaration under section 1(4) against an individual acting through a corporation, I can see no reason in the present case why a declaration against Kuhl personally will further the goals of the section.

73. The corporate documents filed establish that the Meadowcroft Group has full authority to bargain collectively on behalf of the owners, to obtain labour relations advice, and to take all other steps required in order to manage the retirement home. The agreement between the owners and the Meadowcroft Group cannot be terminated at will, and it can be assigned only if George Kuhl remains intimately involved in the day-to-day running of the home. With the Meadowcroft Group Limited found to be the employer of the employees at Livingston Lodge (together with Nutra 2000 and the numbered company which holds the title) I am satisfied that there is sufficient stability on the employer side for bargaining to proceed. Furthermore, any future changes in the management structure utilized by the

owners should be able to be followed with relative ease given that George Kuhl is the principal of two of the entities which have been found to be related employers involved in the running of Livingston Lodge.

74. I will add that the failure of Kuhl, or of any representative of Meadowcroft with first-hand knowledge about arrangements with the owners and with Nutra 2000 concerning Livingston Lodge, to testify in these proceedings was disturbing, particularly after I advised counsel for Meadowcroft early in the presentation of his case that he would not meet his onus under section 1(5) of the Act if no-one with such first-hand knowledge was produced. Section 1(5) requires respondents on an application under section 1(4) to adduce at the hearing *all* facts within *their* knowledge that are material to the allegation that they are under common control or direction (emphasis added). Counsel for Meadowcroft argued at the close of the proceedings that he was entitled not to call evidence within his clients' knowledge if evidence on the same point had been given by Mr. Timman on behalf of Nutra 2000. Certainly it seems clear from the evidence which was heard and the documents filed that Meadowcroft was in possession of a great deal of information about which Mr. Timman knew nothing, and in any event I do not accept that Meadowcroft's onus under section 1(5) could be, or was, met by an allegedly unrelated entity. However, the failure of Meadowcroft and of George Kuhl in particular to meet their onus under section 1(5) of the Act does not compel the Board in the circumstances of this case to reach any factual conclusion which was not in any event established on the evidence, or to order particular remedial relief.

THE ORDER

75. For all of the reasons set out above, the Board declares that the Meadowcroft Group Limited, 1166067 Ontario Limited and 1107989 Ontario Limited c.o.b. Nutra 2000 shall be treated as constituting one employer for the purposes of the *Labour Relations Act, 1995*.

76. This ruling disposes of the two applications under section 1(4) of the Act, but there are outstanding issues on the two applications for certification which may have to be resolved before a final decision and certificates can issue.

77. Meadowcroft argued at the outset of these proceedings that the representation vote should be set aside because of "confusion" which it claimed must have arisen in the minds of the voters due to the Board's inclusion of "Nutra 2000", "Livingston Lodge" and "Meadowcroft" as the name of the employer on the Board's decisions and notices. In a decision dated February 24, 1997, the Board declined to consider this issue until after a determination had been made as to the identity of the employer. Having regard to the order now issued, I would expect that this argument might now be abandoned by Meadowcroft, but counsel should have an opportunity to seek advice on this point and advise the Board of his client's intentions.

78. In any event, there is an outstanding dispute as to the status of two individuals claimed to be in CUPE's bargaining unit, which does not impact on the union's entitlement to be certified but which may have an affect on the description of the bargaining unit.

79. The parties are therefore directed to file with the Board and deliver to each other their submissions as to what issues are outstanding on each of the applications for certification, by May 25, 1998. After review of these submissions the Board will make whatever directions are required, which may, on Board file 2754-96-R, include setting a timeframe for the making of detailed submissions on the status issue pursuant to the Board's Information Bulletin No. 4.

80. This panel will remain seized.

81. The responding party Nutra 2000 is directed to post copies of this decision at the workplace in conspicuous locations where they are likely to come to the attention of all employees in the proposed bargaining units.

0320-98-R; 4303-97-R United Steelworkers of America, Applicant v. **Maxi**, Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor; United Steelworkers of America, Applicant v. Maxi & Co., A Division of Provigo Inc., Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor

Certification - Evidence - Practice and Procedure - Voluntary Recognition - Applicant and intervenor disputing whether restriction on use or disclosure of document produced by intervenor to applicant should continue after document entered into evidence - Board concluding that implied undertaking will not limit use to which applicant may put the document once it has been produced into evidence in the course of proceeding - Board identifying no other basis in this case upon which it should restrict use to which document could be put outside of proceedings, or extent of its disclosure in the hearing

BEFORE: *Pamela Chapman*, Vice-Chair.

APPEARANCES: *James Hayes, William Gibson and Doug Hammond* for the applicant; *Richard Anstruther and Tim Timpano* for the responding party; *Alan M. Minsky* for the intervenor.

DECISION OF THE BOARD; June 16, 1998

1. These are applications for certification for units of employees working at two different retail stores operated by Provigo Inc. carrying on business as Maxi and/or Maxi & Co. ("Provigo").

2. By decisions dated February 25, 1998 and May 1, 1998, the Board directed the taking of representation votes at the two locations, but in each case ordered the ballot box to be sealed. Indeed, the ballots have still not been counted, as there is a dispute as to whether or not the applications by the United Steelworkers of America ("the USWA") are timely. At each location the United Food and Commercial Workers International Union, Local 175 ("the UFCW") claims to have pre-existing bargaining rights by virtue of a voluntary recognition agreement with Provigo, and it is not disputed that the instant applications would not be timely should the voluntary recognition agreements be determined to be valid. However, the USWA argues that there are no voluntary recognition agreements within the meaning of the Act, and in the alternative that any agreement found by the Board should be terminated pursuant to section 66 of the *Labour Relations Act, 1995* ("the Act"), or because of employer support contrary to section 15 of the Act.

3. At the hearing of this matter on June 12, 1998 the Board considered a preliminary issue relating to the document claimed by the UFCW and Provigo to be a voluntary recognition agreement applying to both stores. The UFCW filed a copy of this agreement dated August 15, 1997 with its intervention in each file, but significant portions of the document had been deleted. At the request of counsel for the USWA on an earlier hearing date, an unedited version of the document was produced for his and his client's review, but this production was made subject to an explicit undertaking by counsel not to show the document to anyone other than a single advisor, and not to disclose its contents.

4. Counsel for the UFCW and for Provigo wish to rely upon this document at the hearing of this matter to establish that there is a valid voluntary recognition agreement in place between them, but they do not intend to have the entire document admitted into evidence. However, counsel for the USWA, having reviewed the document in its entirety, argues that the Board must have before it the whole document in order to fairly characterize its significance, and intends to rely upon certain portions sought to be excluded by the other parties in support of his arguments on the status of the document, and on the allegation of employer support.

5. The dispute which was argued before me on the last hearing date is over the status of the document in terms of its disclosure to others if and when it is admitted into evidence. The UFCW and Provigo seek to restrict the use of the document to these proceedings, and to ensure that it is not copied, excerpted or otherwise disclosed to persons outside of the hearing. The USWA, on the other hand, takes the position that the document becomes a public one once it has been relied upon in these proceedings and that its contents can therefore be disclosed to anyone, by anyone.

6. There was no real argument that there is a limit to the use that may be put to a document that one party obtains from another in the course of litigation before the Board. In the present case counsel agreed to an explicit and extremely restrictive undertaking in order to obtain production of the document on consent. In any event, all three parties agreed that there is in Ontario an implied undertaking on a party who obtains production of a document from another party in the course of litigation not to use the document for a purpose other than that of the proceeding in which the document was obtained, except with consent of the other party or with the leave of the court or tribunal. While there has been some confusion in Ontario over the status of this common law rule, it appears to have resolved by the decision of the Court of Appeal in *Goodman v. Rossi*, (1995) 24 O.R.(3d) 359, where the court determined that the implied undertaking should be applied where production of otherwise private documents is obtained through litigation.

7. The Board has concluded that such an undertaking ought to be implied where documents are produced in the course of proceedings before it in several cases, including *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659. In that case the Board considered the significance of the implied undertaking where parties produce documents pursuant to a subpoena *duces tecum* issued and enforced by the Board, and concluded that a breach of such an undertaking, which is to the Board as much as to the other party, would be punishable by a finding of contempt (at paragraph 19). It seems clear that documents produced in compliance with a Board order would also be subject to the implied undertaking limiting their use.

8. In *Goodman v. Rossi*, *supra* at page 370, the Court of Appeal expressed some concern about the extension of the implied undertaking to the automatic production of documents required by the Rules of Civil Procedure, given that the rule originated as a condition for the issuance of an order for discovery, but ultimately concluded that it should apply to discovery pursuant to the Rules. Similarly, it makes sense that the rule should apply where the parties in proceedings before the Ontario Labour Relations Board produce documents to each other and file them with the Board in compliance with the Board's Rules of Procedure. As the Court of Queen's Bench said in *Prudential Assurance Co. v. Fountain Page Ltd.*, [1991] 1 W.L.R. 756 (Q.B.) (cited in *Goodman v. Rossi*, *supra*):

This undertaking is implied whether the court expressly requires it or not. The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information. However treating it as having the character of an implied undertaking continues to serve a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; ...

9. However, the law is not so settled, and the parties in this proceeding do not agree, on the question of what restriction, if any, there is on the use of documents admitted into evidence. Counsel for the intervenor and the employer argue that the implied undertaking continues to apply even after a document is determined to be relevant and is tendered as an exhibit, and they cite the decision of the House of Lords in *Home Office v. Harman*, [1983] 1 A.C. 280 in support of that position. In that case, a majority of the House of Lords found a solicitor in contempt of court when she allowed a reporter, at the conclusion of a trial, to review certain documents which had been produced to her in the course of litigation. The documents had been read in open court during the opening statement made on behalf of her client (although they were subsequently ruled inadmissible). The majority determined that the implied undertaking continues to restrict the use to which documents produced by a party to a proceeding can be put by the party opposite and its counsel, despite the essentially unrestricted use (subject to the laws of copyright and defamation) to which the same material could be put by a member of the public and/or the media who chose to attend at the hearing and make a note of its content.

10. In a strong dissent, a minority of the Lords expressed concern with this anomaly and concluded that the requirements of public justice and freedom of speech were inconsistent with a continuation of the undertaking:

... The undertaking of the litigant and his solicitor not to use documents disclosed to them on discovery for any purpose other than the action does not apply to the documents once they have been produced and read out, in whole or in part, in the course of a public trial. Whether they be held to be admissible or inadmissible as evidence is immaterial; ...

11. While counsel for the employer urged me to follow the House of Lords on this point, it appears that the majority decision is no longer good law in England. As part of the settlement of an application to the European Commission on Human Rights made by the solicitor who had been found in contempt, the specific holding in the case was reversed by an amendment to the rules in 1987. The Rules of the Supreme Court (in the United Kingdom) now provide that:

...

[a]ny undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the Court, or referred to, in open court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs.

...

12. Having reviewed this decision carefully, I must agree with the approach taken by the minority and now incorporated into the rules of civil procedure in England. The purpose of the implied undertaking is to protect the private documents of one party, to which another party would have no access but for a legal proceeding, by restricting their use to the proceeding in which they are produced. This protection is particularly important where the relevance and admissibility of documents has not yet been established, and it serves to encourage generous production of all documents which are arguably relevant to the proceedings.

13. Once a document has been admitted into evidence, however, it is no longer confidential in the same sense and its contents may be disclosed to all persons present at the hearing, and reported by them to others. In these circumstances it can no longer be said that the party to whom production was made could not obtain access to the document by any means other than by way of that production, and it makes little sense to impose an arbitrary limit on the use of the document by the litigant and counsel which does not apply to others attending at the hearing or reading or hearing reports.

14. This issue as to the duration of the undertaking has not been decided definitively in Ontario, but the Court of Appeal in *Goodman v. Rossi*, *supra*, expresses support for the dissenting reasons in *Home Office v. Harman*, *supra*, and suggests that the implied undertaking should be limited as it has been by the change of the rules in the United Kingdom.

15. For all of these reasons, I have concluded that the implied undertaking which presently applies to limit the use to which the USWA may put the document which has been produced to its counsel, will not so limit its use once the agreement of August 15, 1997 has been introduced into evidence in the course of these proceedings.

16. Is there any other basis on which I can and should restrict the use to which the document can be put outside of these proceedings, or the extent of its disclosure in the hearing?

17. Section 9 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484 (“the SPPA”) establishes that oral hearings shall be open to the public except where the tribunal determines that matters involving public security, intimate financial or personal matters, or other matters where the need to avoid disclosure outweighs the principle of public hearings, ought not to be disclosed. In these circumstances, a tribunal may hold a hearing *in camera*.

18. The circumstances in the present case do not justify the exclusion of the public from the hearing when the document which is alleged to be a voluntary recognition agreement is being considered. Certainly the issues before me do not raise matters involving public security or intimate financial or personal matters, and I am satisfied that the concerns of the UFCW about use by the USWA of the information contained in the agreement, for campaigning and propagandizing, do not establish an exceptional interest in non-disclosure sufficient to meet the requirements of section 9 of the SPPA.

19. Outside of the provision for the holding of hearings closed to the public which is contained in the SPPA, the Board has a general power, pursuant to section 109(16) of the Act, to establish its own practice and procedure, which might well lead the Board in an appropriate case to impose restrictions on the disclosure of evidence and/or documents, or to limit the use of such material outside proceedings before the Board. Certainly the Board has and will undoubtedly continue to edit sensitive documents which disclose personal information about third parties which is not required for the adjudication of the issues in a particular matter. One can also imagine that in an appropriate case the Board might restrict the use to which the parties could put certain evidence in a particular case because of a concern that labour relations harm would otherwise result.

20. In the present case, however, no compelling reason for the imposition of such a restriction has been offered, other than the desire of the intervenor and responding party to shelter the details of the arrangements between them from scrutiny. The main concern of the UFCW, as described by their counsel, is that excerpts from the August 15, 1997 document will be taken out of context and publicized by the USWA in a way which is prejudicial and misleading. Frankly, the best way to ensure that this does not occur is not to impose conditions of secrecy on the document, but rather to deal with it openly and fairly in the course of the hearing, and in the Board’s decision, in order that an objective characterization of its significance may be reported and discussed. Counsel for the UFCW argued that restricting the document *outside* the hearing would have no impact on the holding of a fair hearing by the Board, as the Board could ensure that all parties were able to rely upon whatever portions of the document were found to be relevant, and would be able to review the whole document for its deliberations. However, holding a fair hearing is not just about the conduct of the hearing, but also about the *appearance* of fairness. Where the parties intend to rely to a significant degree upon a particular document, and the Board will need to interpret it in order to reach and to explain its conclusions, an atmosphere of secrecy around its contents is inconsistent with the goal of transparent decision-making and will not encourage support for the Board’s processes.

21. In the circumstances of this case I see no reason to make any particular order limiting the extent to which any document admitted into evidence can be disclosed, or the use to which it can be put, and the motion of the intervenor is therefore denied.

1429-97-U; 1434-97-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Ontario Pipe Trades Council an United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Applicants v. **Mechanical Contractors Association of Ontario**, Mechanical Contractors Association of Windsor, State Group Ltd. - Mario Cossarini, Vollmer & Associates Contractors Limited - John Vollmer, Southern Mechanical Contractors Ltd. - Louis Panontin, Lekter Industrial Services Inc. - David Holek, Fahrhall Mechanical Contractors Ltd. - John Fahringer, Mid-South Contracting Limited - Robert Nantais and Haller Mechanical Contractors Inc. Richard Haller, Responding Parties; Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Applicants v. Mechanical Contractors Association of Ontario and Employers listed on Schedule "A", Responding Parties

Construction Industry - Construction Industry Grievance - Practice and Procedure - Unfair Labour Labour Practice - Union alleging unfair labour practice and referring grievance to Board alleging violation of collective agreement in respect of local pension and welfare benefit plan purportedly changed in provincial bargaining - Board rejecting submission that Board ought to defer to dispute settlement mechanism found in trust documents or to the courts or to Pension Commission - Board noting that issues raised before it lie at core of Board's jurisdiction under sections 96 and 133 of the Act

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *S. B. D. Wahl, R. Pearn and J. Boyle* for the applicant; *Richard J. Charney, J. Timothy Lawson and Stephen Coleman* for MCAO; *L. P. Kavanaugh, Q.C., Mario Cossarini, Richard Haller and David Holek* for MCAW.

DECISION OF THE BOARD; May 20, 1998

I

1. This is an arbitration proceeding under section 133 of the *Labour Relations Act*, that was launched together with a related complaint under section 96 of the Act. The "section 133 application" alleges various breaches of a provincial collective agreement. The "section 96 complaint" alleges various breaches of the *Labour Relations Act* itself.

2. In each case, the Board is being asked to examine the relationship between the provincial collective bargaining scheme for ICI construction, and a Windsor-based pension and welfare benefit plan that has existed outside the ambit of that scheme for many years. The Board is being asked: whether provincial collective bargaining can properly require changes to the local plan; whether the 1995 round of bargaining properly effected such changes; and whether the response of local employers

and the MCAW has contravened both the collective agreement and the *Labour Relations Act* - especially those provisions of the Act prohibiting "local bargaining".

3. The union says that in the course of the 1995 round of provincial bargaining (i.e. for the 1995-1998 collective agreement), the bargaining parties at the provincial level entered into an agreement (*inter alia*) to change the structure of the Windsor benefit plan. In accordance with this agreement, the beneficiaries of that plan (primarily union members or former members) were to be given an option to maintain the current structure, where the local union and local employers each appoint trustees, or, alternatively, to opt for a new arrangement in which there would no longer be trustees appointed by the local employers. In other words, the members were to be given the option of switching from a "jointly-trusted plan" to one in which only the union and its members selected the trustees.

4. The union says that, following the negotiation of this provision, the overwhelming majority of local members have rejected the jointly-trusted model and have opted, instead, for a structure in which trustees are selected by the union. But the employer-appointed trustees have refused to withdraw, and have refused to bring their plan into compliance with provincially-negotiated norms. According to the union, the local employers have said that they are only prepared to yield on this issue if they receive, in return, *other concessions* on local wages and working conditions.

5. The union asserts that the local employers are in breach of the provincial agreement, and that their resistance to change is being used as a "bargaining chip" to support "local bargaining" - something that is expressly prohibited by section 162 of the *Labour Relations Act*:

162. (1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) Subject to sections 153 and 161, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on April 30 calculated triennially from April 30, 1992.

The term "provincial agreement" is defined this way:

"provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126.

6. In the union's submission, the statutory scheme permits the negotiation of benefits at the provincial level, and prohibits local negotiations which have not been sanctioned by the *employer* and *employee* provincial bargaining agencies. That is what provincial bargaining is all about. It does not matter that some local employers may not like what was bargained at the provincial level. Nor does it matter that the Windsor-based plan has historically existed outside the collective agreement, because in

1995, the provincial bargaining agencies removed that anomaly, giving the union members an option that they did not have before. The union asserts that provincial bargaining and the provincial agreement override the local arrangement.

7. The local employers reply that the pension and welfare benefit plan *pre-dated* the provincial collective bargaining scheme introduced in 1978, and has operated entirely outside that provincial scheme for almost 20 years. The local fund has its own legal foundation found in its own constituting trust documents; moreover, it operates within its own statutory framework which includes *inter alia*, the *Pension Benefits Act*. Through all these years, the plan has been “jointly trusted”, and in MCAW’s submission, the provincial bargaining agencies are neither entitled to modify it, nor have they effectively done so.

8. MCAW asserts that the union has not shown a “*prima facie* case” of a breach of the collective agreement or the statute; and, in any event, the Board should either defer to the dispute settlement mechanism found in the trust documents, or should defer to the Courts who, MCAW says, have primary jurisdiction to address pension/benefit/trust matters. The MCAW points out that the “Pension Commission” may also have some role to play because it, too, has some regulatory authority in this area. MCAW denies that the discussions with a view to resolving this dispute should be construed as unlawful local bargaining.

9. This is a very abbreviated summary of what this case is about. So how do these assertions fit within the scheme of the *Labour Relations Act*?

II

10. Under the *Labour Relations Act*, unions and employers are mandated to engage in collective bargaining with a view to concluding a provincial collective agreement; and as will be seen, the definition of “provincial agreement” is exceptionally wide. It is clearly elastic enough to encompass welfare or pension arrangements for employees or former employees. Indeed, it is not really disputed that construction collective agreements normally *do* provide for pension and welfare benefit funds, to which individual employers are obliged to contribute. *Prima facie*, this is a permissible subject of collective bargaining.

11. Nor can it be disputed that in the ICI sector of the construction industry, collective bargaining does not take place at the local level between individual employers and individual “local unions”. Since 1978, the *Labour Relations Act* has required province-wide bargaining *by trade*, through *provincial* employer and employee bargaining agencies, designated by the Minister of Labour. The designated employer and employee bargaining agencies are mandated by statute to represent their respective constituencies. Thus, for example, section 157(a) of the Act reads this way:

157. Where an employer bargaining agency has been designated under section 153 or accredited under section 155 to represent a provincial unit of employers,

- (a) *all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement.*

12. In effect, ICI bargaining takes place on a provincial basis between an “employer association” on the one hand, and a provincial grouping of geographically-based local unions on the other. (For a more detailed description of the provincial bargaining scheme see the Board’s recent decision in: *Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers*, 4532-97-M released April 2, 1998, as yet unreported); [now reported at [1998] OLRB Rep. Mar./Apr.

285]. The result of that bargaining is a provincial agreement that is binding on all employers, local unions and employees.

13. Under the *Labour Relations Act*, ICI bargaining *must* take place at the provincial level. This is not a voluntary process. The statute specifically prohibits both local bargaining and local arrangements which collide with the provincial collective agreement, or are not sanctioned by both provincial bargaining agencies.

14. It is clear, therefore, that the provincial bargaining agencies can establish province-wide pension or welfare benefit funds; and, subject to section 167 of the Act, they can probably do so whether or not individual employers or union locals agree with such arrangements. In this respect, benefit plans are no different from wages or any other term or condition of employment that may be the subject of provincial collective bargaining. The ultimate result may not be what particular employers, employees, or union locals might hope to achieve, but the provincial collective agreement is binding nevertheless.

15. On the other hand, as counsel for MCAW points out, it is much less clear whether or how collective bargaining can tinker with an existing benefit plan with its own trust arrangements and its own fiduciary obligations - especially where, as here, that plan pre-dated provincial collective bargaining and has been left untouched, for years, despite successive rounds of provincial bargaining. The fact that the provincial bargaining parties may be able to create a *new* benefit arrangement and compel contributions to it, does not necessarily mean that they can absorb or materially change a pre-existing fund. That depends - at least in part - upon the permissible reach of provincial bargaining under the *Labour Relations Act*, whether the bargaining objective collides with legal obstacles outside the ambit of labour law, and perhaps whether the bargaining objective is congruent with vested pension or property rights. And, given the history of this particular arrangement, section 167 of the *Labour Relations Act* may be engaged as well.

16. That said, it seems to me that there is no reason for this Board to defer to some other tribunal or delay its own consideration of these matters. On the contrary, the issues lie at the core of the Board's jurisdiction under sections 133 and 96 of the *Labour Relations Act*. To put the matter another way: the issues under review in this case involve the statutory scheme over which the Board has exclusive jurisdiction, as well as a collective agreement, for which the Board is the statutorily-designated arbitrator.

17. Under section 48 of the *Labour Relations Act*, the parties to a collective agreement are obliged to submit to arbitration any dispute concerning "the interpretation, application, administration or alleged violation of the collective agreement, including any question as to whether a matter is arbitrable", and under section 133 of the Act, the Board is the designated arbitrator for construction industry collective agreements. When acting as arbitrator, the Board is mandated to determine whether there is or is not a collective agreement in existence, whether a particular document is or is not affected by or incorporated by reference into that collective agreement, whether the negotiated collective agreement is or is not congruent with the law (*Bd. of Education for Etobicoke* [1973] 1 O.R. 437; *McLeod v. Egan* (1974), 46 D.L.R. (3d) 150; section 48(12) of the Act), how the agreement (or changes to the agreement) may affect "the rights, privileges or duties" of the employers; and so on. Moreover, given the decisions of the Courts in *St. Anne-Nackawic Pulp and Paper Co. Limited* (1986), 28 D.L.R. (4th) 1 (S.C.C.); *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.); *The Queen in Right of New Brunswick v. O'Leary* (1995), 125 D.L.R. (4th) 609 (S.C.C.); *Re Dayco (Canada) Ltd.* (1993), 102 D.L.R. (4th) 609 (S.C.C.) and especially *Pilon v. International Minerals and Chemical Corporation (Canada) Limited et al.* (1996), 141 D.L.R. (4th) 72 (Ont. C.A.), it is arguable that the Board - acting as arbitrator - has *primary jurisdiction* to consider disputes "arising from the collective agreement" (to use the words of the Court in *Weber*).

18. It may be, as MCAW says, that the local trust document creating the fund is not itself a "collective agreement" or is not incorporated into the provincial agreement. But that is an issue that the Board will have to decide; and even if MCAW is right, the Board may still have to decide whether the local arrangement now *collides* with the provincial agreement.

19. In addition, (and quite apart from its role as arbitrator) the OLRB has the exclusive jurisdiction to interpret and apply the *Labour Relations Act* within which, of course, the provincial bargaining scheme is embedded (see sections 151-168 of the Act). That jurisdiction not only allows the Board to consider the ambit of provincial collective bargaining, but also permits the Board to determine whether particular arrangements or behaviour contravene provisions of the statute - as the union here alleges. And the Board's remedial jurisdiction under section 96 of the Act operates both in addition to and "despite the provisions of any collective agreement" (see section 96(4) of the Act, and the observations of the Divisional Court in *Tandy Electronics Ltd.* (1980) 115 D.L.R. (3d) 197).

20. In summary, while there may be some force to the MCAW's position "on the merits" of this case, I see no reason why the Board should not deal with these issues on their merits. I see no reason to defer to the Courts or anyone else.

21. In my view, the union's allegations make out a *prima facie* breach of **both** the collective agreement and the *Labour Relations Act*, so that the Board should hear the case on its merits, decide whether a breach of the Act or the agreement has been made out, and determine what remedy, if any, should flow.

22. For the foregoing reasons, these matters will be relisted for hearing.

23. However, I do not wish to leave this matter without one concluding observation.

24. It appears to me that, at the heart of the dispute, is the interplay between provincial collective bargaining and any limitation on bargaining outcomes that might flow from: trust or other law extrinsic to the labour relations scene; pension or benefits regulations; or the exercise of the Board's remedial discretion even if some violation of the collective agreement or statute are made out. Accordingly, it seems to me that, with a little bit of effort, counsel may be able to address these legal concerns on the basis of facts that are more or less agreed - or agreed for the purpose of argument. For while many factual assertions are made, it is not at all clear to me that the Board need hear the evidence with respect to all of these matters in order to resolve the legal issues that are at the core of the parties' dispute.

25. Be that as it may, the Registrar is directed to relist these matters for hearing before a "construction panel". I am not seized.

2947-94-R; 3010-94-R The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Applicant v. **Ontario Hydro**, Responding Party v. Power Workers' Union, CUPE Local 1000, Intervenor #1 v. Labourers' International Union of North America, Local 1059, Intervenor #2 v. Electrical Power Systems Construction Association, Intervenor #3; Labourers' International Union of North America, Local 1059, Applicant v. Ontario Hydro, Responding Party v. Electrical Power Systems Construction Association, Intervenor #1 v. Power Workers' Union, CUPE Local 1000, Intervenor #2 v. Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the

Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Intervenor #3

Bargaining Rights - Bargaining Unit - Certification - Construction Industry - UA and Labourers' union applying to represent certain employees of Ontario Hydro working in ICI sector of construction industry - UA and Labourers' union and Power Workers' Union entering into "jurisdictional accords" and all parties agreeing that bargaining units in certification applications be described so as to exclude bargaining rights held by PWU - Board, however, not regarding it as appropriate to incorporate terms of trade agreement into bargaining unit description

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *S.B.D. Wahl* and *S. Morrison* for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527; *John Moszynski* and *Bill Casemore* for Labourers' International Union of North America, Local 1059; *M. Patrick Moran*, *R. Currie* and *N. Donnelly* for Ontario Hydro; *M. Patrick Moran* for Electrical Power Systems Construction Association; *J. Monger*, *C. Dassios* and *W. Campbell* for Power Workers' Union, CUPE Local 1000.

DECISION OF THE BOARD; May 1, 1998

I. Introduction

1. The name of the applicant in Board File 2947-94-R is amended to read "The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527", in accordance with section 106 of the *Labour Relations Act*, R.S.O. 1990, c. L.2 (hereinafter referred to as "the Act").
2. These are applications for certification in the construction industry. The applications were filed with the Board on November 17, 1994, prior to the effective date of the *Labour Relations Act*, 1995, and therefore are to be determined by reference to the Act. The applicants (hereinafter referred to respectively as "the U.A." and "the Labourers") have applied under section 146(1) of the Act to represent members of their respective trades in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in Board Area 3.
3. By way of decision dated July 18, 1997, this panel of the Board resolved certain preliminary issues in favour of the applicants. The applications were scheduled to return before the Board in late 1997 and early 1998 for the litigation of other issues identified in a pre-hearing memorandum prepared by former Vice-Chair Davie dated July 24, 1995. Without going into great detail regarding the events of the latest group of hearing days, a number of those days were devoted towards dealing with certain procedural matters and hearing the representations of the parties regarding the effect of separate agreements reached by the U.A. and the Labourers' with the Power Workers' Union (hereinafter "the P.W.U."). This decision deals with one of those matters, namely the description of the appropriate bargaining unit in each of these applications.
4. Prior to dealing with the merits of the above issue, the Board feels it necessary to note the following. On or about April 29, 1998, at least one of the parties to these proceedings received from the Board what appears to be a decision on the issue dealt with herein. That document is *not* this decision, but in fact was a draft that had been prepared for internal circulation and discussion only. The document

that was received by at least one of the parties was *not* signed by the Vice-Chair of this panel of the Board and was *not* intended for external circulation. The Board apparently telefaxed that draft in error. In the circumstances, the Board directs that any party in possession of such a draft destroy it and any copies that may have been created.

II. The Description of the Bargaining Units Claimed to be Appropriate for Collective Bargaining

5. At the outset of these proceedings, both the U.A. and the Labourers' claimed a "standard" ICI bargaining unit, having regard to section 146 of the Act; that is, each claimed, in accordance with the designations made by the Minister of Labour under the Act, a bargaining unit composed of construction labourers and plumbers and plumbers' apprentices and steamfitters and steamfitters' apprentices in the ICI sector of the construction industry, as the case may be, and for those same trades in all other sectors of the construction industry, in Board Area 3, save and except for non-working foremen and those above the rank of non-working foreman. In essence, then, each of the U.A. and Labourers' were looking to represent its customary ICI bargaining unit.

6. As a result of certain "jurisdictional accords" reached by each of the U.A. and the Labourers' with the P.W.U., the parties to these proceedings have now altered their positions with regard to the description of the appropriate bargaining units. The Labourers' claims that the appropriate bargaining unit in its application is the following:

all construction labourers in the employ of Ontario Hydro in the ICI sector of the construction industry in the Province of Ontario, save and except persons covered by the P.W.U. collective agreement, and all construction labourers in the employ of Ontario Hydro in all other sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except persons covered by the P.W.U. collective agreement and save and except persons employed under the collective agreement between EPSCA and the OACTC, save and except for non-working foremen and persons above the rank of non-working foreman.

The bargaining unit now requested by the U.A. in its application is the following:

All plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ontario Hydro:

- (a) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and
- (b) in all other sectors of the construction industry, save and except the industrial, commercial and institutional sector in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin (OLRB Geographic Area 3),

save and except non-working forepersons and persons above the rank of non-working foreperson and persons performing P.W.U. pipefitting work in accordance with the Pipefitting Trade Jurisdiction Appendix "A" attached hereto and paid in accordance with the collective agreement between the P.W.U. and Ontario Hydro.

Clarity Note: For the purpose of clarity, as of the date of application herein, November 17, 1994, persons employed pursuant to the collective agreement in effect between the P.W.U. and Ontario Hydro, performing pipefitting work in accordance with the existing jurisdictional lines of demarcation between the P.W.U. and the U.A. are not within the appropriate bargaining unit.

Specific reference to certain clauses in the "jurisdictional accords" in question will be made below.

7. Ontario Hydro does not accept that either of the above descriptions of the bargaining unit are appropriate for collective bargaining. With respect to the Labourers' application, it submits that the following unit is appropriate for collective bargaining:

all construction labourers in the employ of Ontario Hydro, in the ICI sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin (OLRB Geographic Area 3), save and except the electrical power systems sector, persons employed pursuant to the collective agreement between the Power Workers' Union and Ontario Hydro performing construction labourers work in accordance with Ontario Hydro's past practice, and non-working foremen and persons above the rank of non-working foreman.

With regard to the U.A. application, Ontario Hydro submits that the appropriate bargaining unit is the following:

all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ontario Hydro, in the ICI sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin (OLRB Geographic Area 3), save and except the electrical power systems sector, persons employed pursuant to the collective agreement between the Power Workers' Union and Ontario Hydro performing pipefitting, plumbing and/or steamfitting work in accordance with Ontario Hydro's past practice, and non-working foremen and persons above the rank of non-working foreman.

8. On the consent of all of the parties, the two Memorandums of Agreement which reflect the separate agreements of the U.A. and Labourers' with the P.W.U. were placed before the Board. The agreements are similar but are different in significant ways. Certain provisions of those agreements are pertinent to the disposition of the issue raised for decision before us. The Memorandum of Agreement between the Labourers' and the P.W.U. contains a Jurisdictional Accord which reads, in part, as follows:

- 1.00(b) It is the intention of the parties that this Accord fairly and reasonably protect the right of members of PWU bargaining units to continue to do the work they did prior to the issuance of any Certificates in OLRB File No. 3010-94-R ("the Certificates").
- 1.00(c) The purpose of this Accord is to state the jurisdictional agreements between the Labourers and PWU with respect to work performed by or for Ontario Hydro and its successors in the areas to which any Certificate by the OLRB in case number 3010-94-R relates, and to provide a fair and expeditious method of resolving disputes involving jurisdictional claims and differences concerning the interpretation and application of the Accord. This Accord relates only to construction trades work as encompassed by any Certificates issued in Board File No. 3010-94-R or by any Collective Agreements related to the Certificates.
- 2.02 The parties acknowledge that work at the Bruce Nuclear Power Development and all other Bulk Electric System operating facilities of Ontario Hydro and/or its successors is covered by PWU/Hydro and Labourers/EPSCA Collective Agreements and that work jurisdiction at these facilities is governed by the Chestnut Park Accord and the Inn on the Park Accord. The parties also acknowledge that both PWU members and Labourers' members perform construction industry work for Ontario Hydro in all sectors and that the PWU and Labourers collective agreements, subject to this agreement and the two Accords mentioned above, cover such work.

Paragraph 1 of a subsequently executed addendum to the initial Memorandum of Agreement provides that "as of the Application date herein, November 17, 1994, persons employed pursuant to the Collective Agreement in effect between PWU and Ontario Hydro performing work in accordance with the existing jurisdictional lines of demarcation between the PWU and the Labourers are not within the appropriate bargaining unit".

9. In a similar vein, the relevant provisions of the Memorandum of Agreement between the U.A. and the P.W.U. (and the description of the bargaining unit which the U.A. asserts is appropriate for collective bargaining) make reference to "the Pipefitting Trade Jurisdiction Appendix 'A'". That

Appendix is critical to the determination of the question before the Board, and is, accordingly, reproduced below in its entirety:

Pipefitting Trade Jurisdiction Agreement

The P.W.U. and the U.A. agree that all non-EPSCA plumbing, pipefitting and steamfitting work (pipefitting work) performed by or for Ontario Hydro and its successors in the areas to which any certificate by the Ontario Labour Relations Board in Case #2947-94-R relate, shall be assigned and performed as follows:

- (a) employers, contractors and/or subcontractors, other than Ontario Hydro and its successors, shall assign and perform all construction industry pipefitting work using U.A. tradespersons exclusively.
- (b) Ontario Hydro and its successors shall assign and perform all pipefitting work using direct employees as follows:

- (i) New Construction shall be assigned and performed as follows:

- new facilities
- new systems
- permanent dismantling/demolition

using U.A. tradespersons exclusively.

- (ii) Modifications shall be assigned and performed as follows:

- major modifications using U.A. tradespersons exclusively
- minor modifications using P.W.U. tradespersons exclusively

The threshold separating major modifications from minor modifications shall be a total of 160 pipefitting tradesperson hours per project.

Modifications shall consist of:

- renovations
- additions or extensions to facilities or systems.

- (iii) Repair shall be assigned and performed as follows:

- major repair using U.A. tradespersons exclusively
- minor repair using P.W.U. tradespersons exclusively

The threshold separating major repair from minor repair shall be a total of 160 pipefitting tradesperson hours per project.

- (iv) *Service and Maintenance* shall be assigned and performed using P.W.U. tradespersons exclusively.

- (v) If it is determined pursuant to the collective agreement between the P.W.U. and Ontario Hydro that P.W.U. members will not perform the pipefitting work then such pipefitting work shall be performed by Ontario Hydro using U.A. tradespersons under the terms of the operative U.A. collective agreement.

It was in the context of these provisions of the respective agreements that the Board heard the argument of the parties on the issue of the appropriate bargaining unit. In our view, it is important to briefly outline the argument of the parties on this issue, and we therefore do so, immediately below.

III. Argument of the Parties

10. Counsel for the Labourers' made two specific submissions regarding the appropriateness of the unit submitted by his client. First, with respect to the issue of dealing with the Labourers' existing bargaining rights in the Electrical Power Systems sector of the construction industry, counsel noted that his description of the unit specifically identified the collective agreement which contains those rights. In counsel's view, it is proper to exclude the bargaining rights held by his client under the EPSCA/OACTC collective agreement by making reference to that agreement, rather than by excluding the Electrical Power Systems sector from the scope of the certificate issued in this proceeding. Counsel noted that Ontario Hydro consistently takes the position that the EPSCA/OACTC collective agreement does not cover the entire sector. In light of that position, counsel for the Labourers' submitted that the non-ICI certificate ought to (and, by reference to section 146(1) of the Act, in fact must) encompass all outstanding Electrical Power System sector bargaining rights, and that the only way to effect such a result is to specifically exclude only those rights currently held under the EPSCA/OACTC collective agreement.

11. With regard to the bargaining unit description put forward by Ontario Hydro, counsel for the Labourers' disputed the appropriateness of making reference to "persons employed pursuant to the collective agreement between the Power Workers' Union and the Respondent performing construction labourers work in accordance with the Employer's past practice". In counsel's submission, such wording in the bargaining unit description flies in the face of the Board's long-standing practice to not deal with jurisdictional disputes in certification applications. In effect, the criterion of "employer past practice", typically an important factor in a work assignment dispute, is incorporated into the bargaining unit description, and therefore the certificates issued by the Board.

12. Counsel for the U.A. approached the argument from a different perspective, though he agreed with the Labourers' submissions regarding the need to describe the Electrical Power Systems bargaining rights by reference to the appropriate collective agreement rather than by reference to the sector itself. With respect to the bargaining unit urged as appropriate for collective bargaining in the U.A. application, counsel identified what he described as a "critical" difference between his clients' jurisdictional accord with the P.W.U., and that of the Labourers'; in particular, that the U.A./P.W.U. agreement does *not* acknowledge that the collective agreement between Ontario Hydro and the P.W.U. covers *construction* plumbing, pipefitting or steamfitting work. In conjunction with the P.W.U.'s withdrawal of its position that its collective agreement was a bar to the application for certification, this critical fact could only lead the Board to conclude that there is really no need to exclude from the U.A.'s certificates any person working in the P.W.U. bargaining unit, because to do so would be unnecessary, given that none of the bargaining unit work of the P.W.U. would be covered by any certificate issued by the Board to the U.A.

13. That being said, counsel for the U.A. submitted that he felt it was appropriate to exempt certain individuals from the scope of the bargaining unit - namely "persons performing P.W.U. pipefitting work in accordance with the Pipefitting Trade Jurisdiction Appendix 'A'... and paid in accordance with the collective agreement between the P.W.U. and Ontario Hydro". This, he submitted, was quite a different thing than acknowledging that the collective agreement between the P.W.U. and Ontario Hydro covered "construction" work. Counsel submitted that it was appropriate to refer to the Appendix "A" in the bargaining unit description because the U.A. and the P.W.U. had agreed that certain work performed which may affect the construction industry pipefitting work ought to be assigned in accordance with existing jurisdictional lines. Counsel asserted that the assignment reflected by the Pipefitting Trade Jurisdiction Appendix "A" reflected that existing assignment of work.

14. Making reference to the decisions of *Alcan Aluminium Limited*, [1997] OLRB Rep. May/June 305, *Gottcon Contractors Limited*, [1990] OLRB Rep. Jan. 25, and *Gisborne Design Services Ltd.*, [1995] OLRB Rep. June 796, counsel submitted that the practice of the Board relating to making reference to a collective agreement in the “save and except” part of a bargaining unit description is to limit such references to situations where the parties agree that the collective agreement in question covers portions of the construction trades that are the primary subject of the certification application. Here, of course, the parties agreed that the collective agreement between the P.W.U. and Ontario Hydro was not a bar to the certification application, and therefore it is unnecessary to make reference to that collective agreement in the U.A.’s bargaining unit.

15. Counsel for the P.W.U. did not entirely agree with the submissions made by counsel for the U.A.. Counsel asserted that its position that the P.W.U. collective agreement did not constitute a bar to the U.A. application for certification was dependent upon a bargaining unit description being utilized which protected and preserved his client’s existing work jurisdiction and bargaining rights. In his view, the “save and except” clause in the U.A.’s proposed bargaining unit description satisfies the Board’s practice of preserving existing bargaining rights, and recognizes that the P.W.U.’s bargaining rights extends to the kinds of work listed in the appendix itself, some of which “quite likely” could be found to be construction work as the Board typically defines it. However, all of that being said, counsel submitted that the bargaining unit description being put forth by the U.A. was appropriate for collective bargaining in this case.

16. Counsel for Ontario Hydro took issue with a number of the propositions put forward by opposing counsel. With respect to the issue of the exclusion of the electrical power systems sector bargaining rights, counsel submitted that it was more appropriate to exclude those rights by making reference to the sector itself. Counsel acknowledged that, in other proceedings, Ontario Hydro has submitted that the bargaining rights held by the applicants in their respective EPSCA collective agreements did not occupy the entire field of the electrical power systems sector, but submitted that there is a long bargaining history in that sector as between Ontario Hydro and the respective applicants, and that the parties ought to be permitted to bargain any extension in the context of EPSCA collective agreement negotiations, should they so desire.

17. With respect to the bargaining unit proposed by the Labourers’, counsel for Ontario Hydro noted that because it did not specifically reference the jurisdictional accord reached between the Labourers’ and the P.W.U., the description was consistent in many ways with that proposed by Ontario Hydro. Counsel noted that his client’s proposed unit (unlike that of the Labourers’) made reference to the prior practice of Ontario Hydro, and acknowledged that such a reference could well lead to a few disagreements between the parties. However, such a result was preferable to the alternative, which was the possibility that the Labourers’ and the P.W.U. would, through their jurisdictional accord, usurp the right of management to assign work as it considers appropriate.

18. This latter observation was made most vigorously with regard to the bargaining unit proposed by the U.A.. In his submissions respecting the appropriate bargaining unit in the U.A. application, counsel argued that the effect of finding the bargaining unit proposed by the U.A. to be appropriate would be to “force the jurisdictional accord down the throat of the employer” by way of the certification process. Counsel stated that Ontario Hydro did not agree with the submission of both the U.A. and the P.W.U. that the terms of the jurisdictional accord reflected the historical practice of Ontario Hydro in assigning “plumbing and pipefitting” work - that the line of “160 hours” was not reflective of Ontario Hydro’s practice whatsoever.

19. Counsel for Ontario Hydro also submitted that the argument by the U.A. that there was no admission in its jurisdictional accord that the work performed by the P.W.U. was “construction” work

was, in reality, “smoke and mirrors”. It was conceded that those words were never used, but that the division of work agreed to between those two unions definitely indicated that the P.W.U. had performed construction work historically. Going further, counsel submitted that Ontario Hydro’s withdrawal of its earlier position that the P.W.U. agreement with Ontario Hydro was a bar to these applications for certification was based upon the acknowledgement by both the Labourers’ and the U.A. that the P.W.U. did perform minor work in the nature of “construction”. For the U.A. to take the position that its jurisdictional accord does not reflect that fact is inappropriate. Accordingly, counsel submitted that the most appropriate way to preserve the rights of the P.W.U. would be to recognize, in the bargaining unit description, the prior rights held by the P.W.U. in the sectors for which the U.A. seeks bargaining rights. That is, the certificates desired by the applicants ought to be subject to a “carve out” of the rights previously held by the P.W.U., as proposed by Ontario Hydro.

20. Counsel for the U.A. made certain submissions in response to these latter arguments. Counsel disputed that the jurisdictional accord as between the U.A. and the P.W.U. was not reflective of the existing jurisdictional lines, and stated that the two unions had “hammered out the closest and clearest approximation” of those lines. He agreed that the P.W.U. tradesmen had performed, on occasion, “construction” plumbing and pipefitting work. However, he submitted that any such work, when performed, was never performed within the scope of the collective agreement between Ontario Hydro and the P.W.U.. Accordingly, the P.W.U. and the U.A. could settle their jurisdictional accord by reference to the “bright line test” of 160 hours. Counsel also submitted that if Ontario Hydro withdrew its position regarding the “bar” on the basis of a misapprehension relating to the position of the U.A., that was not a factor that ought to have any bearing in these proceedings.

21. Finally, counsel for the Labourers’ took issue with the submission made by Ontario Hydro that the parties ought to be permitted to “bargain” an extension of the collective agreements between them in the electrical power systems sector. Counsel noted that it is trite law that one cannot proceed to impasse on the issue of recognition and the scope of the bargaining unit. Effectively, counsel submitted, those individuals not covered by the EPSCA agreements in question would be precluded from representation. Accordingly, the proposition made by Ontario Hydro in this regard ought to be rejected.

IV. Decision of the Board

22. At the outset, we will dispose of the easiest issue raised in these proceedings. In our view, the exclusions in the bargaining unit descriptions respecting the bargaining rights currently held by the applicants in the electrical power systems sector ought to be effected by reference to the specific collective agreements rather than by reference to the sector itself.

23. The reason for such a conclusion is evident. Section 146(2) of the Act requires that, upon certification of the applicants by the Board, two certificates will issue. One of the certificates is to be confined to the I.C.I. sector of the construction industry. The other certificate is to encompass “all other sectors in the appropriate geographic area or areas”. Presumptively, then, the latter certificate would encompass the electrical power systems sector of the construction industry.

24. However, the parties have already bargained certain rights of representation in the electrical power systems sector of the construction industry. These representation rights ought to be carved out of the second certificate. However, the full scope of these bargaining rights is uncertain, as the rights were achieved by way of voluntary recognition and not certificate. The EPSCA collective agreements binding Ontario Hydro and the U.A. and Labourers’, respectively, may, or may not, encompass the entire electrical power systems sector. If they do not, excluding those bargaining rights from a certificate by reference to the sector itself would have the effect of excluding from representation those construction labourers and plumbers and pipefitters who fall beyond the reach of the EPSCA agreements, notwithstanding that it is evident that the intention of section 146(2) of the Act was to capture all of those

employees within the certificate representing all other sectors of the construction industry other than the I.C.I. sector.

25. For obvious reasons, the suggestion that the parties be permitted to bargain any necessary extension of the EPSCA collective agreements is not an answer to this issue. For each trade, the statutory scheme requires that the second certificate grant bargaining rights for all sectors of the construction industry other than the I.C.I. sector, and the only way to ensure that the certificate has that effect is to exclude pre-existing rights in one or more of those sectors by making reference to the existing collective agreements providing those rights. Accordingly, the exclusion of the electrical power system sector bargaining rights held by the applicants will be effected by reference to the appropriate EPSCA collective agreement.

26. A far more difficult and policy-laden question is the appropriateness of the bargaining unit descriptions proposed by the applicants, particularly that proposed by the U.A.. We have considered quite carefully the arguments of the parties regarding the appropriateness of the bargaining units. We have also reviewed the case authorities provided by counsel. The decision of the Board in *Alcan Aluminium Limited*, [1997] OLRB Rep. June 305 deserves some specific reference, as it would appear that the structure of the bargaining unit proposed by the U.A. is premised on its understanding of the application of that decision.

27. *Alcan Aluminium*, like the instant case, consisted of two applications for certification. The applicants were Millwright Local 1410 and U.A. Local 221. Each desired a certificate from the Board which covered its tradespersons in the I.C.I. sector of the construction industry, and a second certificate covering its trade in all other sectors of the construction industry in Board Area 30. In both applications for certification, two locals of the United Steelworkers of America, and a local of the International Association of Machinists and Aerospace Workers intervened. Alcan Aluminium carried on business at three relevant locations for the purposes of the certification applications - Toronto, Bracebridge and Kingston.

28. The question of the appropriate bargaining unit was raised in both certification applications. The employer and the intervening unions argued that construction work was carried on in the various Alcan plants, and that to the extent that Alcan used its own employees to do that work at the three plants, the work was performed by employees represented by the unions under their respective collective agreements. The employer and the intervening unions submitted that the pre-existing bargaining rights held by the intervening unions ought to be "carved-out" from the applicants' bargaining rights. The applicants, on the other hand, argued that the intervening unions held no bargaining rights for construction employees, and merely because a collective agreement had been applied to work or employees could not establish those bargaining rights.

29. Ultimately, the Board accepted the argument put forth by the employer and the intervening unions. At pages 312 and 313 of the decision, the Board makes the following observations:

26. ...the Act operates to preserve and protect established bargaining rights against erosion by employers, or incursion by other trade unions. Concomitantly, the Board's jurisprudence demonstrates a well-established practice of recognizing and preserving existing bargaining rights. In the result, the Act has (always) been interpreted and applied with a view to promoting labour relations peace and stability.

27. This is readily apparent from the Board's approach to applications for certification with respect to employees in workplaces or where bargaining rights have already been established (as demonstrated in decisions like *Gottcon Contractors*, *supra*, and *The Georgian Building Corporation*, *supra*). Where an employer already has one or more trade union collective bargaining partners, the established bargaining rights operate to prohibit or limit a subsequent application for certification with respect to employees to whom those bargaining rights apply...

28. Even where a trade union makes an application for certification with respect to employees who are unrepresented, it is sometimes necessary to make it clear that the bargaining unit applied for does not include employees who are already represented by a (usually another) trade union, particularly where the application is made outside of an open period. This is generally accomplished by including some "save and except" language, like that suggested by the intervening trade unions in these applications, in the bargaining unit description...

29. The Board has a discretion in dealing with bargaining unit description issues, whether these issues relate to questions of geographic scope or other matters. This is appropriate because it permits the Board, as an expert labour relations tribunal, some latitude in structuring appropriate bargaining units. However, the Board's discretion is directed by the Act, and the degree of discretion which the Board has is not the same in every case. It is axiomatic that the discretion which the Board has in a particular case depends upon the direction which the Act provides.

The Board then proceeded to discuss the distinction between construction and non-construction labour relations, and the differences in defining bargaining units in the construction industry from those in the industrial context generally. The Board went on to note that whether an agreement between an employer and a trade union extends bargaining rights held by a trade union to particular employees or particular work depends upon the mutual intent of the parties to that agreement.

30. The Board thereupon considered the specific circumstances before it:

54. Whether or not they would be construction employees on the Board's test, it is clear that employees covered under the Steelworkers' or Machinists' collective agreements ... sometimes perform construction work which in the construction industry is performed by plumbers, steamfitters (pipefitters) or millwrights under those collective agreements. It is apparent that the amount of construction work performed under these collective agreements, and the time spent performing construction work by employees in those bargaining units varies. However, it is also apparent that construction work in either trade is *not* performed on a daily basis, or at least not enough of it to make the employees who perform it into construction employees (on a daily basis) according to the Board's test.

The Board went on to analyze the extent of the construction work being performed at the three locations of the employer, and reached the following conclusions:

60. It is therefor [sic] apparent that Alcan and the Steelworkers have mutually intended that the collective agreements between them cover millwrights employed at the Foil plant in Toronto and at the Cable plant in Bracebridge. Similarly, it is apparent that Alcan and the Millwrights have mutually intended that the collective agreement between them covers plumbers, steamfitters (which are the same as pipefitters for purposes of the Act: see *D.E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228), and millwrights at the Rolled Products Plant in Kingston.

61. In the result, the Board is satisfied that some "save and except" exclusionary language is appropriate, but only to the extent necessary to protect the Steelworkers and Machinists existing bargaining rights.

Of significance for the purposes of these proceedings, the Board went on to observe the following:

62. In that respect, in an application for certification the Board does not concern itself with issues of work jurisdiction. Applications for certification are about the representation of employees.... Undoubtedly, the acquisition of bargaining rights can have work jurisdiction implications for the employees, for the employer, and for any other trade union which holds bargaining rights for other employees of the employer, but these do not relate to any issue which it is necessary or appropriate for the Board to determine in an employee representation proceeding. On the contrary, work jurisdiction issues are appropriately dealt with under the jurisdictional dispute provisions of section 99 of the Act, and the process which has been specifically designed to deal with such issues ... This is why the Board describes both construction and non-construction bargaining units in terms of the employees in them rather than the terms of the work performed (except in the anomalous case of construction operating engineers).

In the result, the Board was satisfied that it was appropriate to include something in the bargaining unit description to preserve the Steelworkers' and Machinists' bargaining rights. The Board ultimately excluded from the bargaining rights awarded to the applicants the bargaining rights held by the intervening unions by reference to the specific collective agreements the latter unions had with Alcan.

31. In essence, and amongst other things, *Alcan Aluminium* stands for the proposition that, in certain limited circumstances (i.e. where the employer and a third party trade union have mutually agreed that a collective agreement will cover certain trades or work) it will be appropriate to exclude from an applicant's I.C.I. bargaining unit (and therefore the two certificates which may be granted by the Board) bargaining rights held by that third party trade union. Only in those circumstances will an exclusion of that nature be appropriate.

32. There is no direct evidence before us of a "mutual intent" of Ontario Hydro and the P.W.U. that their collective agreement cover construction labourers and journeymen plumbers, pipefitters and their respective apprentices. Each of the Labourers', the P.W.U. and Ontario Hydro assert that members of the P.W.U. have performed construction labourer, plumbing and pipefitting work under the Ontario Hydro/P.W.U. collective agreement. On the other hand, the U.A. has taken great pains to assert that the P.W.U. has never performed construction plumbing or pipefitting work under its collective agreement with Ontario Hydro. Presumably, then, an exclusion of bargaining rights reflected by the *Alcan Aluminium* decision would not be appropriate for inclusion in the bargaining unit if this were in fact so.

33. In the circumstances before us, we are satisfied that the collective agreement between Ontario Hydro and the P.W.U. was mutually intended to include "construction" labourer, plumbing and pipefitting work. Counsel on behalf of each concede that this is in fact the case. The jurisdictional accord as between the P.W.U. and the Labourers' also concedes that members of the P.W.U. have performed work of a construction labourer. Accordingly, each of the Labourers', the P.W.U., and Ontario Hydro agree that the work of a construction labourer has been performed by members of the P.W.U..

34. The situation is not quite as clear with regard to the question of the performance of plumbing and pipefitting work under the Ontario Hydro/P.W.U. collective agreement, but a review of Appendix "A" to the Memorandum of Agreement as between the P.W.U. and the U.A. makes it clear that "construction work" has been performed by members of the P.W.U. under that collective agreement. Counsel described the Pipefitting Trade Jurisdiction Agreement represented at Appendix "A" as reflecting the existing trade lines as between the P.W.U. and the U.A.. A review of that document identifies, as work performed by members of the P.W.U., "minor repair", the concept of "minor" meaning "a total of 160 pipefitting tradesperson hours per project". It is trite law that work in the nature of "repair" is construction work, and not maintenance work. Accordingly, one can only conclude from its inclusion on the "P.W.U. side" of the Appendix, and the submission that the Appendix reflects the existing trade line demarcation as between the U.A. and the P.W.U., that the P.W.U. have performed "construction" plumbing and pipefitting work pursuant to the P.W.U./Ontario Hydro collective agreement.

35. Each of the parties to these proceedings has submitted that the bargaining rights held by the P.W.U. ought to be excluded from the bargaining rights, if any, obtained by the applicants. In all of the circumstances, it would appear appropriate to do so.

36. The next question to be answered, though, is how to effect that exclusion. Dealing first with the proposed bargaining unit description made by the U.A., is it appropriate to exclude the P.W.U. bargaining rights by excluding "persons performing P.W.U. pipefitting work in accordance with the Pipefitting Trade Jurisdiction Appendix "A" attached hereto and paid in accordance with the collective

agreement between the P.W.U. and Ontario Hydro", and with the accompanying clarity note? In the circumstances, we do not agree that it is appropriate to do so.

37. As an initial observation, we have some sympathy with the purpose behind the inclusion of such a provision, with its explicit reference to a work jurisdiction agreement. The provision is intended to minimize, to the greatest extent possible, work disputes as between the U.A. and the P.W.U.. The Memorandum of Agreement also contains an arbitration process and various other provisions which would facilitate the resolution of disputes as between those same two parties. There is nothing inherently problematic about such trade agreements - they are relatively common in the construction industry and are a factor taken into account by the Board when determining a work assignment dispute under section 93 of the Act (now, of course, section 99 of the *Labour Relations Act, 1995*).

38. Notwithstanding the inherent worthiness of a trade agreement, however, one must question the incorporation by reference of such an agreement into the description of a bargaining unit. At the very least, one is immediately faced with the long-standing principle (reiterated by the Board in *Alcan Aluminium Limited, supra*, at paragraph 62) that claims relating to work jurisdiction ought not to be determined or resolved in representation proceedings.

39. The significance of this long-standing principle is highlighted by the facts of this case. The U.A. and the P.W.U. have, through negotiation, reached a trade agreement regarding work jurisdiction and have, as well, agreed upon a method of resolving those disputes as between them. But what about Ontario Hydro, the responding party to the U.A. application for certification? It certainly has not "bought into" the jurisdictional accord. It does not concede that the threshold of 160 tradesperson hours per project agreed to by the U.A. and the P.W.U. in any way reflects its current practice of assigning work as between members of the U.A. and members of the P.W.U.. Nor has it "bought into" the accord executed as between the P.W.U. and the Labourers'. However, the latter jurisdictional accord is markedly different, because it is not referred to in the bargaining unit proposed by the Labourers'. As Ontario Hydro is not bound by that document, and as there is nothing which "ties" Ontario Hydro in any way to that document, it is not as troubling for Ontario Hydro.

40. That is not the case with regard to the U.A. jurisdictional accord with the P.W.U.. The U.A. effectively asks the Board to incorporate the terms of the "Pipfitting Trade Jurisdiction Appendix 'A'" into the description of the bargaining unit. Appendix "A" states that the U.A. and the P.W.U. agree that Ontario Hydro "shall assign and perform" pipefitting work in a certain way. Would reference to Appendix "A" in the bargaining unit description unfairly tie the hands of Ontario Hydro?

41. As was pointed out by counsel during the course of argument, there is nothing inherently troubling by the fact that a certificate of the Board has the effect of "tying the hands" of an employer. By its very nature, *any* certificate has that effect - it can hardly be a defence to an application for certification that the work assignment options available to an employer post-certificate would be lessened. That being stated though, there is, in our view, something troubling about "tying the hands" of Ontario Hydro in a way defined by the U.A. and the P.W.U., when Ontario Hydro asserts that the demarcation line agreed to by the two unions does not accurately describe Ontario Hydro's historical work assignment line between the two trades. Quite simply, the U.A. and the P.W.U. ought not to be entitled to unilaterally define that line of demarcation for Ontario Hydro in the context of an application for certification.

42. Accordingly, we are of the view that the bargaining unit description proposed by the U.A. is not a bargaining unit which would be appropriate for collective bargaining. We do, however, consider the bargaining unit proposed by the Labourers' to be appropriate for collective bargaining, with one or two slight amendments. In our view, then, the following are appropriate bargaining unit descriptions in these two proceedings:

(a) Board File 2947-94-R

all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ontario Hydro in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ontario Hydro in all other sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed under the P.W.U. collective agreement with Ontario Hydro, save and except plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed under the U.A. collective agreement with EPSCA, and save and except for non-working foremen and persons above the rank of non-working foreman.

(b) Board File 3010-94-R

all construction labourers in the employ of Ontario Hydro in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Ontario Hydro in all other sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except construction labourers employed under the P.W.U. collective agreement with Ontario Hydro, save and except construction labourers employed under the Ontario Allied Construction Trades Council collective agreement with EPSCA, and save and except for non-working foremen and persons above the rank of non-working foreman.

43. A few final observations. First, there were, during the course of argument, suggestions by both Ontario Hydro and the P.W.U. that their position regarding the "bar" argument (raised at the outset of the proceedings and expressly withdrawn during the course of the hearing) was dependent upon a certain bargaining unit description being achieved. As a result of this decision, one or both of Ontario Hydro and the P.W.U. may desire to give effect to this submission. We will not entertain any such argument at the resumption of hearings. When a party withdraws a position unequivocally, and without reservation, it is inappropriate, at a later time, to add a qualification to one's withdrawal of that position. Here, the withdrawals of the "bar" arguments were without qualification or reservation. Accordingly, it does not now lie for these parties to revisit that question.

44. Finally, the resolution of the bargaining unit issue leaves one final phase of these proceedings, namely the "list" issues. Ontario Hydro has raised these issues for determination. It is our view that, at this stage of the proceedings, Ontario Hydro ought to be particularizing its position regarding the various individuals alleged to be in the bargaining units described above.

45. Accordingly, we make the following directions and orders to facilitate the resolution of the remaining issues in dispute:

- (a) Ontario Hydro is to identify, within two calendar weeks of the date of this decision, the names of those persons it asserts ought to be on the list of employees in each application for certification. A summary of the material facts upon which it intends to rely in support of its position is to be included with the list. Ontario Hydro is to file such a list and submissions with the Board, and to deliver same to the respective parties, within that two calendar week timeframe;
- (b) Any party that asserts that an individual or individuals ought not to be on the lists of employees must file with the Board and deliver to the other parties written submissions providing the reasons for each of their challenges, and a summary of the material facts upon which they intend

to rely, within two calendar weeks of receipt of the lists from Ontario Hydro;

46. Upon receipt of these submissions, the Board will make further directions regarding the resolution of the remaining issues in dispute.

4072-97-PS Employees' Association of Ottawa-Carleton, Applicant v. **Ottawa-Carleton Catholic District School Board**; Service and Commercial Employees Union, Local 272; Canadian Union of Public Employees and its Local 2357, Responding Parties

Public Sector Labour Relations Transition Act - Parties disputing whether there should be one or two non-teacher bargaining units at successor District School Board - Board finding that two bargaining units appropriate

BEFORE: *Timothy W. Sargeant*, Vice-Chair.

APPEARANCES: *James Cameron* for the applicant; *John Read* for Ottawa-Carleton Catholic District School Board; *Risa Pancer* for CUPE Local 2357 and *Frederica Wilson* for SCEU Local 272 the responding parties.

DECISION OF THE BOARD; May 22, 1998

1. This is an application under the *Public Sector Labour Relations Transition Act, 1997*.
2. Pursuant to an agreement between the parties dated April 9, 1998, a consultation was scheduled for May 6, 1998. At the consultation the parties agreed the Board should hear argument on the issue in dispute and render a decision on such issue.
3. Pursuant to the agreement dated April 9, 1998, the issue the parties asked the Board to adjudicate was:

1. The issue which the parties request the Board to adjudicate is as follows:

In the context of this school board amalgamation, should there be one non-teaching bargaining unit or more than one.

It is the applicant's position that there should be one. It is the responding parties' position that there should be two.

The issue is clarified in the agreed statement of facts as follows:

1. The fundamental dispute between the parties is the composition of the bargaining unit(s) in the amalgamated school board.
2. The applicant has applied for a single "all employee" unit. Each of the responding parties has proposed two bargaining units. Although the employer, CUPE and the SCEU have all described the proposed units in somewhat different terms, there is basic agreement amongst the responding parties on the composition of the two proposed units. One unit would be comprised of maintenance, service and plant employees and bus drivers. The other bargaining unit would include office, clerical, and administration support employees and all educational teaching assistants.

4. The parties further agreed in the agreement dated April 9, 1998 that "the Board make a determination on this issue only and order a vote. All issues relating to the form and content of the vote will be agreed upon by the parties with the assistance of the Labour Relations Officer". The parties requested that a decision on this issue be rendered as soon as possible "as they are anxious to have a vote prior to the completion of the school year" which the Board understands to be June 30, 1998.

5. For the purpose of this hearing the parties reached the following agreed statement of facts:

CURRENT BARGAINING UNIT COMPOSITION

3. There are currently six bargaining units at the school board that are affected by this application - two from the former Ottawa Catholic board and four from the former Carleton Catholic board. The bargaining units are represented by three different bargaining agents, the Service and Commercial Employees Union, Local 272 ("SCEU"), the Canadian Union of Public Employees, Local 2357 (CUPE) and the Employees' Association of Ottawa Carleton (EAOC).

The existing bargaining units are:

SCEU Maintenance, Services and Plant

CUPE Office, Clerical, Technical and Educational Teaching Assistants

EAOC Administration Support

EAOC School Support

EAOC Educational Support

EAOC Technical Support

THE SUCCESSOR AND PREDECESSOR BOARDS

4. The predecessor Boards were the Carleton Roman Catholic School Board ("CRCSB") and the Ottawa Roman Catholic Separate School Board ("ORCSSB").
5. The CRCSB had seven families of schools, including seven high schools and thirty-seven elementary schools. The curriculum covered junior kindergarten to OAC. There were approximately 23,000 students, and 1,400 teachers.
6. The Employees' Association of Ottawa Carleton ("EAOC") represents four units of employees from the CRCSB. According to figures supplied by the school board there are 117 permanent and 50 casual employees in a school support bargaining unit, 148 and 104 casual employees in an educational support bargaining unit, 64 permanent and 30 casual employees in an administrative support bargaining unit and 162 permanent and 47 casual employees in a technical support unit. There are a further 121 non-unionized employees, including 42 bus attendants and housekeepers.
7. The ORCSSB had three families of schools, including three high schools and twenty-eight elementary schools. Like the CRCSB, the curriculum covered junior kindergarten to OAC. Approximately 11,000 students attended these schools, and were taught by approximately 600 teachers.
8. According to figures provided by the school board there are 133 and 8 casual employees in the Canadian Union of Public Employees ("CUPE") Local 2357's bargaining unit, 136 permanent and 8 casual employees in Service and Commercial Employees Union ("SCEU") and a further 56 non-unionized employees.
9. The successor board, the Ottawa-Carleton Catholic District School Board, has ten families of schools, with ten high schools and sixty-five elementary schools.

ORGANIZATIONAL STRUCTURE OF SCHOOL BOARD

10. The interim organizational structure in place at the amalgamated school board provides for 11 separate departments (see Schedule "A" attached):

Director's Office and Corporate Affairs
 Human Resources
 Finance and General Services
 Instructional Services and Community Relations
 Staff Development, Evaluation and Research
 Program
 Community and Continuing Education
 Student Services
 Central Administrative Services
 Information Technology
 Plant and facilities

11. Three departments are broken into divisions or sub-departments. The department of Finance and General Services is divided into i) Finance and ii) Purchasing and General Services. The department of Information Technology is divided into i) Computer Services, ii) Computer Studies and iii) Information Services. The department of Plant and Facilities is divided between i) Facilities and ii) Plant: Maintenance and Operations.
12. All of the employees in the EAOC Technical Support bargaining unit and the SCEU bargaining unit fall within the Plant; Maintenance and Operations sub-department of the department of Plant and Facilities. Also included amongst the non-management personnel in this department are three clerks, one community use person, and two secretaries. In the predecessor school boards, similar clerical positions existed in the equivalent departments. The incumbents in the clerical positions are, as they were prior to amalgamation, members of either the EAOC Administrative Support unit or the CUPE bargaining unit. The maintenance and custodial employees either work at our out of particular schools or the school board's Stittsville plant building. The clerical and secretarial employees of the Plant: Maintenance and Operations sub-department work out of the Stittsville plant building.
13. Employees covered by the other EAOC bargaining units and the CUPE bargaining unit are spread amongst the remaining departments and either work at the school board's administration buildings or in the schools.

THE BARGAINING AGENTS

Employees Association of Ottawa Carleton

14. The Employees' Association of Ottawa Carleton ("EAOC") represents employees of the former Carleton Roman Catholic School Board in four bargaining units. These units have historically been described as the administrative support unit, the school support unit, the education support unit, and the technical support unit.
15. The EAOC has been the bargaining agent for employees in the administrative support unit and the technical support unit since 1984. (Attached are copies of the certificates issued by the OLRB.)
16. At the time of the EAOC's application for certification, the Canadian Union of Public Employees already held bargaining rights for a bargaining unit of school secretaries (the predecessor of EAOC's school support unit). There were, at that point, few developmental specialists or assistants employed by the Board. There were a very few teacher assistants on staff, but no move was made to organize them until around 1988, following a multi-Board agreement on the funding of special education programs. At this point, more teacher assistants were hired, as were developmental assistants and developmental specialists. CUPE gained bargaining rights for these employees around 1989 or 1990. Although the four units each had their own collective agreement, the EAOC and the Board bargained together for the administrative support and the technical support units, as did CUPE and the Board for the school support and the educational support units.
17. In 1993 the EAOC became the bargaining agent for both the school support and the educational support units.

18. Subsequently, the EAOC and the CRCSB continued to negotiate separate agreements for the four bargaining units, although the negotiations were done at the same time, at the same table and with a single negotiating team. The provisions of the four collective agreements are in many cases virtually identical. A ratification vote is held for each collective agreement. Although each collective agreement refers to labour/management meetings, a single meeting is held for all four bargaining units.
19. The duration of each of the four collective agreements is the same: September 1, 1996 - August 31, 1998.
20. The scope clause for the administrative support unit is set out in article 3.01 of that collective agreement as all office and clerical employees of the Carleton Roman Catholic School Board, save and except;
 - Recording Secretaries
 - Supervisors and persons above the rank of supervisors
 - Secretary to the Director of Education
 - Secretary to Deputy Director
 - Secretary to Deputy Director: Corporate Affairs
 - Secretary to Superintendent of Finance
 - Secretary to Superintendent of Personnel
 - Secretary to the Administrative Officer
 - Labour Relations Personnel
 - Accountant
 - Communications Officers
 - Professional and Paraprofessional staff
 - Lunchroom Supervisors
 - French Second Language Monitors
 - Teacher Aides
 - Students employed during the school vacation
 - Students employed on work experience
 - Persons covered by other collective agreements
 - Persons employed in a confidential capacity in matters relating to labour relations of the Employees' Association of Ottawa Carleton bargaining units.
21. The scope clause for the school support unit is set out in article 3.01 of that collective agreement as all School employees in the secretarial, clerk-typist and library technician categories as well as all other positions that may be agreed upon by the parties.
22. The scope clause for the technical support unit is set out in article 3.01 of that collective agreement as all employees employed on maintenance and plant operations, save and except:
 - a) Supervisors and persons above the rank of supervisor
 - b) Person employed in a confidential capacity in matters relating to labour relations of the Employees' Association of Ottawa Carleton bargaining units
 - c) Office and Clerical Staff
 - d) Students employed on work experience or summer vacation
 - e) Persons covered by other collective agreements.
23. The scope clause for the educational support unit is set out in article 3.01 of that collective agreement as all Teacher Assistants, Developmental Assistants, Developmental Specialists and Special Assignment Assistants and all other positions as may be agreed upon by both parties. (The parties have agreed to include ESL Teacher Assistants, Kindergarten Assistants, and Interpreter.)

SCEU Maintenance, Services and Plant

24. On October 9, 1974, the Canadian Merchandising Employees Union, Local 104 (CMEU) was certified to represent all employees of the Ottawa Roman Catholic Separate School

Board employed at maintenance, services and plant operations in the cities of Ottawa and Vanier, save and except foremen and persons above the rank of foremen.

25. In 1976, the Service and Commercial Employees Union, Local 272 succeeded the CMEU as the bargaining agent. The change in bargaining agent was recognized by the employer.
26. The composition of the SCEU bargaining unit has remained essentially the same since the original certification. There are currently 139 permanent and casual employees in the unit. The unit was considerably larger, but pursuant to a 1991 decision of the Labour Board approximately half the employees covered by the unit were transferred to the newly established French language separate school board.
27. There has been only one strike in the history of the SCEU bargaining unit. In 1977 members of the SCEU struck the school board for approximately three months. At that time, none of the other non-teaching employees were unionized and the only school board functions disrupted by the strike were in the maintenance, services and plant operations.

Canadian Union Of Public Employees and Its Local 2357

28. The Canadian Union of Public Employees was certified in January 1980, as the bargaining agent for all of the office, clerical employees of the Ottawa Roman Catholic Separate School Board regularly employed for not more than 24 hours per week. The bargaining unit became the Canadian Union of Public Employees and Its Local 2357.
29. About three months later, in March 1980, the Canadian Union of Public Employees was certified as the bargaining agent for all of the office, clerical and technical employees of the Ottawa Roman Catholic Separate School Board save and except persons regularly employed for not more than 24 hours per week. This bargaining unit also became part of the Canadian Union of Public Employees and Its Local 2357.
30. The bargaining units described above were combined into one bargaining unit and are covered by one collective agreement.
31. On or about May 6th, 1992, the Ontario Labour Relations Board certified the Canadian Union of Public Employees as bargaining agent for the Teaching Assistants employed by the Ottawa Roman Catholic Separate School Board.
32. On September 28, 1994, a decision was issued by a panel of the Board on File 1339-94-R combining the Office, Clerical, Technical and Teaching Assistants into one bargaining unit. Up to this point in time, all office, clerical and technical were in one bargaining unit and all teaching assistants were in a second bargaining unit. It was the Board's view that the combining of the two bargaining units into one did not expand the rights of the Canadian Union of Public Employees.
33. The parties to the collective agreements agreed to the combining of the bargaining units into a single bargaining unit of Office, Clerical, Technical and teaching Assistants.
34. The Canadian Union of Public Employees and Its Local 2357 and the Ottawa Roman Catholic Separate School Board have since the 1993-1995 collective agreement one bargaining unit and one collective agreement for "all office, clerical, technical and teaching assistants" employed by the Board.

NON-UNIONIZED PERSONNEL

35. Although most of the non-teaching employees of the school board are represented by a bargaining agent, there are a handful of employees who are unrepresented. The positions of bus attendants, housekeepers and district supervisors are of relevance to this application. Part-time bus attendants and part-time housekeepers have never been organized, while district supervisors were specifically excluded from the EAOC Technical Support unit as being supervisory employees.

36. Persons employed as bus attendants work approximately three hours per day, split between the morning and the afternoon. Bus attendants are responsible for supervising dependently handicapped students being transported to and from school. They have direct contact with the students, assisting them on and off buses, monitoring them on the bus and recording anecdotal, emergency and medical information as necessary.
37. The work of the part-time housekeepers is also related to the dependently handicapped students at the school board. Housekeepers clean and sterilize all equipment and toys used by the students on a daily basis, serve the food brought from home by the students and occasionally assist with the feeding of the students.
38. There are currently 4 District Supervisors.

It should be pointed out that for the purposes of this hearing the parties agreed to use numbers for employees supplied by the employer, though the applicant and the responding union parties did indicate that they did not necessarily agree with such numbers.

6. The relevant sections of the Act are as follows:

1. The following are the purposes of this Act:

1. To encourage best practices that ensure the delivery of quality and effective public services that are affordable for taxpayers.
2. To facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations;
3. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances.
4. To foster the prompt resolution of work-place disputes arising from restructuring.

7. (1) This Act applies upon the assumption by a district school board of the jurisdiction of two or more old boards or of the minority language section of two or more old boards.

(2) For the purposes of this Act, the old boards are the predecessor employers and the district school board is the successor employer.

(3) This Act does not apply in respect of employees to whom the *School Boards and Teachers Collective Negotiations Act* applies.

22. (1) Subject to any agreement under section 20 that is in effect, the Board, upon the application of a successor employer or any bargaining agent that has bargaining rights, may by order determine the number and description of bargaining units that are appropriate for the successor employer's operations after the occurrence described in sections 3 to 10.

(7) In making a determination under this section, the Board shall have regard to the purposes of this Act.

7. As is clear from the agreed statement of facts, there is no agreement under section 20 of the Act.

8. All parties submitted written briefs and augmented such briefs with oral argument. The Board has carefully considered such briefs and arguments.

9. Without detailing in full the submission of the parties which were thoughtful and extensive, the essence of the disagreement centred around the purpose of the Act and whether or not the Board's

jurisprudence now favoured a bigger and broader bargaining unit, given the choice between ordering one bargaining unit or ordering two bargaining units.

10. It is to be noted that none of the responding parties took the position that the single bargaining unit proposed by the applicant was not an appropriate unit. Neither did the applicant take the position that the two bargaining units proposed by the responding parties were not appropriate units. The argument centred around which proposal more appropriately fulfilled the scheme of the Act and the jurisprudence of the Board.

11. Counsel for the applicant submits that his client represents over two-thirds of the total employees directly affected by the application. In his submission though his client had four collective agreements at the predecessor location, the CRCSB, the Board for practical purposes should consider that “from a functional and practical point of view, there [was] only one bargaining unit” at the CRCSB. Counsel points out that all the agreements have virtually the same contract language, were negotiated together by one bargaining team, have the same wage salary grids, the same benefits, the same expiry dates, the same pension, the same grievance and arbitration procedure, and the same managements rights provisions. For example counsel referred to Leave for Association Business which clause provided a combined total leave for all four bargaining units. Counsel conceded that there is no common seniority list for the four units, no bumping rights between units and that each unit has a separate ratification vote. Counsel argues that though legally there are four separate bargaining units, in practice the parties have behaved as if the four units were in fact a single bargaining unit. Such single bargaining unit has worked well at CRCSB and there is no reason to believe it would not work well in the successor OCCDSB.

12. Counsel for the applicant referred to the Board’s jurisprudence in the certification and sale and merger decisions. He pointed out that in certification matters the Board has moved away from the older jurisprudence that it was not appropriate to include office workers in the same bargaining unit as other employees (see for example *Motor Coach Industries Limited* [1992] OLRB Rep. 744 and *Mississauga Hydro Electric Commission*, [1993] OLRB Rep. June 523). Counsel further submits that the Board in certification matters has moved towards broader based units and away from fragmentation see for example, *Ryerson Polytechnical*, [1984] OLRB Rep. Feb. 371, *T.V. Guide*, [1986] OLRB Rep. October 1451, and *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85).

13. Counsel for the applicant argues that this trend is also evident in the sale of business or merger cases. Counsel is of the view that these cases are more relevant to the situation before the Board, in that an amalgamation is more akin to a merger. Counsel submits that the recent Board jurisprudence in the sale of business or merger cases shows a preference towards the bigger broader unit unless it can be shown that such broader unit would result in serious labour relations problems for the employer. Counsel in this regard referred to *North Bay General Hospital*, [1995] OLRB Rep. November 1401 and more particularly to *Pembroke General Hospital*, [1997] OLRB Rep. Sept./October 918 and the references in that case to *Humber/Northwestern/York-Finch Hospital*, [1997] OLRB Rep. Sept./October 872.

14. Counsel for the applicant submitted that there is no evidence that a single unit would cause serious labour relations problems. He further submitted that a single unit most appropriately fell within the purposes of the Act as set out in Section 1 (supra). It is important to remember that two-thirds of the employees are currently represented by the applicant and thus the Board should carefully consider those employees expectations.

15. In relation to section 1 counsel submits if the Board ordered one bargaining unit there would be less costs involved in negotiations then there would be if two units were ordered. Further there

would be less of a chance of a work stoppage. One bargaining unit would certainly rationalize the previous situation and result in savings for the taxpayers. In counsel's submission it is not productive to encourage enclaves of employees. If two units were ordered the result could be two bargaining agents which would decrease the likelihood of mobility for employees. In addition two units might well lead to jurisdictional disputes. In counsel's view, the Act encourages the Board to move away from the status quo. A single unit would fulfill all the purposes of section 1 of the Act. There is just no compelling reason not to order a single bargaining unit.

16. The responding parties, (the employer, SCEU and CUPE) through their counsel submit that two bargaining units would be appropriate and meet the purposes of section 1 of the Act. Counsel point out that two bargaining units would result in a rationalization from the previous six bargaining units.

17. Counsel take issue with the applicant's argument that in practical terms there was only one bargaining unit at the predecessor CRCSB. They point out that there is no common seniority rights or bumping between the four units. Further though conceding that the agreements are very similar there are small differences in each agreement. Finally counsel point out that each unit had the right to individually ratify its collective agreement. Thus individual employee rights are recognized in each bargaining unit. Counsel for CUPE points out that had the applicant wished it could have applied for consolidation of the four units under previous Labour Law Legislation but it chose not to. In the circumstances counsel submits there are four separate bargaining units at the CRCSB from both a legal and practical point of view. Thus to argue, as the applicant does, that ordering two bargaining units would merely be maintaining the status quo does not accord with the facts.

18. Counsel for the responding parties point out that the Act contemplates there may be more than one bargaining unit. Thus section 22 (supra) states the Board may determine "the number and description of bargaining units that are appropriate".

19. Counsel for the SCEU points out that under section 20 the parties themselves could agree to more than one bargaining unit. Counsel for the employer points out that section 22 speaks to what is appropriate "for the successor employer". This test differs from a certification application where the Board merely considers what is an appropriate unit. Counsel for both the unions argue that it is significant that the employer in this instance supports two bargaining units. Surely the employer is in the best position to know what is appropriate for its operation within the purposes as set out in Section 1 of the Act (supra). Historically, counsel for the responding parties point out that the clerical has always been separate from the maintenance bargaining unit in both the predecessor ORCSSB and CRCSB.

20. Counsel for the responding parties argue that community of interest is still a consideration under Board jurisprudence though it may not be determinative. In this instance there is a fundamental difference between the skills and work required in a maintenance unit from the skills and work required in a clerical and administrative unit. Functionally, the maintenance department is set up separately, there are different hours of work, and there is little functional integration between the two groups. The responsibilities of the maintenance group are not, as in the clerical group, related to the education of students or administration of the School Board, but "are related to the upkeep of the school board's physical premises". Whereas employees in the proposed clerical and administrative unit are spread throughout many of the different departments at the School Board, with the exception of the bus drivers, the employees in the proposed maintenance unit all fall within the Plant and Facilities department. Thus there is good reason to order two separate bargaining units and such order would not result in undue fragmentation.

21. Counsel for SECU makes a further point that both it and CUPE have had the existing structure of separate bargaining units at the predecessor ORCSSB for a lengthy period of time - for

over some fifteen years. There is no evidence that by having two units there has been any jurisdictional problems. Pursuant to the agreed statement of facts the applicant only became the bargaining agent for the school support and the educational support units in 1993. (It is to be noted that the applicant had become the bargaining agent for employees in the administration support unit and technical unit in 1984). It is submitted that CUPE and SECU have a longer history of bargaining than the applicant. In addition, this history shows that two bargaining units have functioned well in the predecessor employer's operation at ORCSSB.

22. Counsel for SECU also raised a concern of mobility. In counsel's submission if one bargaining unit was ordered, the chances of mobility of employees would effectively be one way. In counsel's submission it would be difficult, if not impossible, for employees in maintenance work to bump employees in the clerical administrative work. On the other hand for the unskilled positions in maintenance, employees from the clerical group could easily bump employees into such positions.

23. Counsel for the responding parties also point out that if two bargaining units were ordered, each unit would be a substantial unit. Thus there would be roughly 700 employees in a service unit and roughly 300 employees in maintenance units). The employees in the maintenance unit should have their rights protected - which might not happen if only one bargaining unit was ordered.

24. Counsel for the responding parties also take issue that there is a presumption that a larger broader unit should be preferred. There is nothing in the Act that raises such a presumption. Further, there is nothing in the Board's jurisprudence that presumes one unit is best, though counsel concede the Board's jurisprudence in the merger cases shows a preference for broader based units, though not necessarily one unit. The structure proposed by the responding parties are broad based units. If the legislature thought such a presumption should be applied it wouldn't have left so much to the discretion of the parties to come to an agreement concerning the number of bargaining units. Section 20 requires that the Board is to consider what is appropriate for the successor employer. In making that consideration the Board should have reference to the purposes in section 1. Counsel argue that having two units is appropriate and has been proven effective. Counsel argue that by ordering one bargaining unit there would be more work place disputes arising from "the forced integration of groups of employees which do not have a community of interest in terms of their work performed and skills". In counsel's view, for the reasons stated above, it would be far more efficient and rational to order two bargaining units. In counsel's submission, a structure of two bargaining units fits the purposes as set out in section 1 more appropriately than a single bargaining unit.

25. In the course of argument, besides referring to the cases already cited, counsel for the responding parties referred to *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, and *Burns International Security Services Limited*, [1994] OLRB Rep. Apr. 347.

26. In reply, counsel for the applicant submitted that in looking at the nature of the work performed, the Board is opening Pandora's box. For example, what is the community of interest between a carpenter and a custodial employee. Looking at it from the clerical side what does a secretary have in common with a developmental specialist. Thus, the distinction the responding parties make on community of interest should be carefully considered. Further, the fact that maintenance are in a different department should have no bearing. Counsel points out there are some secretaries in that division. He further points out that bus drivers are not in that department but in the Transportation Division. On the other side in the clerical division, employees are scattered throughout a great number of departments. The organisational chart, therefore, should not be a consideration. As far as interaction between the groups is concerned counsel submits that obviously custodial staff are asked to deal with complaints from principals, teachers and secretaries. There can be no question that bus drivers have interaction with the students. In this sense there is most probably more interaction between the groups

of employees than between certain classifications within the clerical unit. In summary, counsel submits that the responding parties admit that a single unit is an appropriate unit and in counsel's view a single unit is the most appropriate unit.

27. As stated before all parties agree that a single bargaining unit would be an appropriate unit; but on the other hand the parties also agree that two bargaining units would also be appropriate units. I agree with comments of counsel that section 22 of the Act contemplates that more than one bargaining unit may be ordered. Section 22 simply directs the Board to "determine the number and description of bargaining units that *are appropriate for the successor employer's operations* (My emphasis).

28. Pursuant to section 22(7) in making such a determination the Board "shall have regard to the purposes of *this Act* (emphasis). The purposes are set out in section 1. Having considered the argument and submissions of all parties, I am prepared to find that both proposals (i.e. a single unit or two units) would in the circumstances of this case meet the purposes of the Act.

29. The applicant has strenuously argued that the Board should for practical purposes find that the predecessor CRCSB was for labour relations purposes represented by one bargaining unit. Counsel for the applicant concedes that legally there were four separate bargaining units at such predecessor. Though the four units at the CRCSB bargained together and had very similar collective agreements (with only minor differences), the Board considers that seniority and the right to bump are major benefits granted to employees under any collective agreement. It was agreed that in the predecessor CRCSB collective agreements there was no common seniority list for the four units, and neither was there a right to bump from one unit to another. Though it was agreed that laid off employees from one unit would be given preference for vacancies in another unit, this is not the same as having the right to bump. In addition each unit at predecessor CRCSB had the right to ratify its own contract individually. In these circumstances the Board is not prepared to find that the predecessor CRCSB was represented by one bargaining unit.

30. Given the above determination, in either proposal there would be a reduction in the number of bargaining units in the successor employer - either from six bargaining units to one bargaining unit - or from six bargaining units to two bargaining units.

31. Without reviewing in detail the Board's jurisprudence, I agree with counsel that the sale of business or merger decisions are more relevant to this situation. All counsel paid particular attention to the *Humber/Northwestern/York-Finch Hospital* (supra) and *Pembroke General Hospital* decisions. While it is true that in both decisions the Board was of the view that "broader based bargaining structures are generally better for collective bargaining and ultimately better for both employers and employees" (see #31 of *Humber*), the facts of each of these cases is clearly distinguishable from this situation. In the *Humber* decision the board was dealing with a situation of whether or not maintenance employees and operating engineers should form a separate bargaining unit or should be included in the service unit. In that case it was conceded that normally such a separate bargaining unit for maintenance employees would not be appropriate. Further, at one hospital being merged, the existing service unit included maintenance employees and operating engineers, whereas at the other hospital being merged maintenance employees and operating engineers were in a separate bargaining unit. The Board was thus faced with a clear choice and in the circumstances decided on the broader unit. Similarly in the *Pembroke* case the Board was faced with a choice in the closure of one hospital and transfer to another hospital, between one hospital in which employees were represented by three bargaining units as opposed to other hospital where all such employees were included in one bargaining unit. Again, the Board opted for the broader unit.

32. In this situation given my finding concerning the bargaining units at the predecessor CRCSB, the Board is not faced with a similar choice. In this instance in one predecessor employer

(CRCSB) there is a history of four bargaining units and in the other predecessor employer (ORCSSB) a history of two bargaining units. The evidence before the Board is that the history of the bargaining units at the predecessor employer ORCSSB has been in place since 1980. Further, the evidence is that such bargaining units have not caused any serious labour relations problems. Based on the Board's early determination, there is no history at either predecessor location of how the operation of one bargaining unit would operate.

33. In the *Humber* decision relied upon extensively in the *Pembroke* decision, the Board did state at paragraph 51:

For the purpose of clarity, it should be noted that although Bill 136 was passed while this case was before the Board, this is an application that was made and decided under section 69 of the *Labour Relations Act, 1995*. Accordingly, the decision should not be taken as a comment on the issues which may arise under this new legislative umbrella".

34. Obviously, the Board's jurisprudence is a factor to be considered - however this must be in the context of the Act. Section 22 (supra) contemplates that there may be more than one bargaining unit that is appropriate. Clearly under section 20(1) the parties themselves "may agree to charge the number and description of the bargaining units in respect of which the bargaining agents have bargaining rights". Under the Act therefore the parties themselves have the right to agree on more than one bargaining unit.

35. Certainly, in this situation if two bargaining units were ordered, each unit would be of considerable size - one unit (service) of approximately 700 and the other (maintenance) of approximately 300. This would not be undue fragmentation in the Board's opinion. Further, each of the units would be a unit that this Board would consider appropriate.

36. The Board has stated that "status quo" is a consideration (see the *Humber* decision), though one that is of less weight than the issue of fragmentation. Though in this instance status quo will not be maintained, there is a long history in the predecessor ORCSSB of a successful two bargaining unit structure.

37. Another factor to consider is that three of the four parties submit that a two bargaining unit structure is preferable. Though the Board must be cautious, as obviously strategic interests of the parties enter into each of the parties' decisions, it is still a matter for consideration.

38. Having considered the submissions and arguments of the parties, the various preferences of the parties, the bargaining relationship in the predecessor employers, and the proposed bargaining unit structures, the Board in these circumstances will order two bargaining units - one service, and one maintenance. This will rationalize the pre existing six bargaining units into two bargaining units. These two units have been shown to function with no labour relations problems caused as a result of such dual existence, and are in themselves substantial bargaining units. These units are certainly appropriate bargaining units within the meaning of section 22 and meet the purposes of section 1 of the Act.

39. With this issue clarified and pursuant to the parties agreement, they should now be able to work out the mechanics of any representation votes that may be required. All bargaining unit employees currently covered by an existing collective agreement will become members of essentially one of the following groups:

SERVICE EMPLOYEES:

- basically office clerical and administration support employers and all educational teaching assistants.

MAINTENANCE EMPLOYEES

- basically maintenance, service and plant employees and bus drivers.

40. In accordance with the parties agreement the matter is directed to the Director of Field Services so the parties with the assistance of a Labour Relations Officer may agree on appropriate bargaining units. A labour relations officer should meet with the parties as soon as possible.

41. The Carleton Catholic District School Board is directed to post copies of this decision adjacent to Board's decision of April 23, 1998 for a period of two weeks.

0141-98-PS Canadian Union of Public Employees and its Locals 1580, 3474 and 4000, Applicant v. Ontario Nurses Association, Ontario Public Service Employees Union, Independent Canadian Transit Union, Association of Allied Health Professionals: Ontario, Retail Wholesale Canadian Division Sector of United Steelworkers of America, Canadian Union of Operating Engineers, The Ottawa Hospital, Responding Parties v. **Royal Ottawa Health Care Group/Services de Santé Royal Ottawa**, The Canadian Union of Public Employees, Local 4000 (formerly Local 942) and Canadian Union of Public Employees and its Local 1976, Intervenors.

Public Sector Labour Relations Transition Act - Board ruling that nursing unit at successor hospital should not include registered practical nurses - Board ruling that separate trades bargaining unit not appropriate - Parties subsequently agreeing that there should be three bargaining units at successor hospital described in general terms as bargaining unit of registered and graduate nurses, a bargaining unit of paramedical employees, and a bargaining unit of service, office and clerical, and trades employees

BEFORE: *Robert Herman*, Alternate Chair.

DECISION OF THE BOARD; June 26, 1998

1. This is an application under the *Public Sector Labour Relations Transition Act, 1997* ("Bill 136").

2. The first issue dealt with by the Board was whether there should be a nursing bargaining unit which consisted only of registered and graduate nurses, or whether it also ought to include RPN's (registered practical nurses). After hearing the submissions of the parties, the Board ruled orally that it would not put RPN's in the nursing bargaining unit. As the Board stated at the hearing, the issue of fragmentation did not arise, as whether the RPN's were put in the nursing bargaining unit would not affect the overall number of bargaining units of the successor employer. However, the Board was sufficiently concerned about mobility rights for the RPN's, and the potential disruption of putting RPN's in a nurses' bargaining unit, that it concluded it was inappropriate to do so.

3. The Board also ruled at the hearing that it would not find as appropriate a separate trades bargaining unit.
 4. At that point, the parties met in discussions and were able to agree on a number of matters. They agreed that there should be three bargaining units at the successor employer, described in general terms as a bargaining unit of registered and graduate nurses, a bargaining unit of paramedical employees, and a bargaining unit of service, office and clerical, and trades employees.
 5. With respect to further discussions over the precise parameters of these three bargaining units, the parties agreed, and the Board hereby orders, that the parties are to exchange responses with each other as to their proposed descriptions for these bargaining units within four weeks of June 24, 1998. As the material filed by the successor employer includes proposed descriptions, the employer need not exchange further proposed descriptions at this stage.
 6. A Board Officer is appointed to meet with the parties, in order to assist them with respect to all matters remaining in dispute. Such meeting is to take place no sooner than September, 1998, hopefully early in that month.
 7. With respect to when a vote or votes might take place with respect to the three bargaining units of the successor employer upon which the parties have agreed, there remains an issue of the future of The Rehabilitation Centre. It is the understanding and agreement of the parties that the vote or votes not be ordered prior to the issuance of a directive from the Minister of Health, dealing with the status of employees at that facility. However, the parties agree that if such directive is not issued prior to September 15, 1998, any party can apply to the Board for a hearing of submissions with respect to the appropriate date or dates for the vote(s).
 8. This matter is adjourned *sine die*, on the above-noted basis.
 9. I am not seized with this matter.
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4339-97-PS; 4361-97-PS Utility Workers of Canada, Applicant v. **Toronto Hydro-Electric Commission**, Canadian Union of Public Employees, Local 1, Canadian Union of Public Employees, Local 11, Canadian Union of Public Employees, Local 208; and International Brotherhood of Electrical Workers, Local 636, Responding Parties; Canadian Union of Public Employees, Local One. Applicant v. Toronto Hydro-Electric Commission, International Brotherhood of Electrical Workers, Local 636, The Utility Workers of Canada, Canadian Union of Public Employees, Local 11 and Canadian Union of Public Employees, Local 208, Responding Parties

Public Sector Labour Relations Transition Act - Representation Vote - Board previously directing that representation votes be held on multiple days using multiple polls to select bargaining agents for "inside" and "outside" bargaining units - Unsuccessful union (Local 11) in representation votes asking Board to set aside votes on ground that Board allowed certain employees to vote at alternate polls on alternate dates, while other employees were told that they could vote only on their assigned date at their assigned poll - Board concluding that even if Local 11 was correct in its assertions, the result of the vote would have been the same - Local 11 also complaining about phone messages left for members by other union (Local 1) regarding how and when they should vote - Board relying on section 23(19) of Public Sector Labour Relations Transition Act and declining to inquire into allegations in view of its finding that the results of

the vote reflect employees' true wishes - Board appointing Local 1 as bargaining agent for inside and outside bargaining units

BEFORE: *D. L. Gee*, Vice-Chair.

DECISION OF THE BOARD; May 7, 1998

1. As directed by the Board in its decision of April 15, 1998, submissions have been filed with the Board by Canadian Union of Public Employees Local 11 ("Local 11") and Canadian Union of Public Employees Local One ("Local One") concerning objections to the votes which were held on March 24, 25 and 26, 1998. Utility Workers of Canada has advised the Board that it is withdrawing its objections on the basis that they appear to be numerically irrelevant. No submissions have been received from Canadian Union of Public Employees Local 208.

2. Local 11 has two bases on which it objects to the vote results. First, its members are asking why the "OLRB did not conduct the vote as specified in the original minutes as to vote days and vote locations" and "why the OLRB did not afford them the same equal right to vote on alternate days in other locations". According to Local 11, this creates a prejudice and its members are requesting that it be corrected. Second, Local 11 asserts that Local One engaged in conduct which resulted in the rights of members to vote for who they wanted to vote for, or not to vote at all, being infringed.

3. As indicated in the Board's decision of April 15, 1998, subsection 23(19) of the *Public Sector Labour Relations Transition Act, 1997* (the "Act") provides as follows:

(19) The Board is not required to enquire into any allegation of a defect or irregularity in a vote if the Board is satisfied that, whether or not the alleged defect or irregularity existed, the results of the vote reflect the true wishes of the majority of the employees in the bargaining unit.

4. Concerning the first basis on which Local 11 challenges the votes, it is apparent that even if all members had voted at the poll and on the date assigned to their local, as Local 11 asserts should have occurred, *Local One would still have won the votes*. It is equally apparent that even if all Local 11 members who did not show up to vote had been aware that they could vote at an alternate poll and in fact did so, and voted in favour of Local 11, *Local One would still have won the votes*. Accordingly, assuming Local 11 to be correct in its assertion that members were required to vote at the poll and on the date assigned to their local, the fact that some members voted at the wrong poll or other members were not aware that they would be permitted to vote at an alternate poll, *had no impact on the outcome of the votes*.

5. Local 11 asserts that numerical relevance is only one aspect of this challenge. Local 11 encourages the Board to enquire into this issue on the basis that the "OLRB is viewed as impartial and thorough in the conduct of affairs in reference to labour relations in the province of Ontario". The Board's primary task in relation to the conduct of votes is to ensure that vote results reflect the wishes of the majority of the employees in the bargaining unit. Where the Board is satisfied that such is the case, the Board does not enquire into challenges raised as to the conduct of a vote. To do otherwise would consume the Board's resources in enquiries that, regardless of the outcome, could have no impact on the result.

6. Local 11's second basis for its challenge to the vote results is based on an allegation of conduct on the part of Local One which is particularized for the first time in its submissions to the Board dated April 20, 1998. Paragraph 8 of the Board's decision of March 17, 1998 indicates as follows:

8. In the event an issue arises concerning the conduct of the vote which any party or person wishes to raise with the Board, such party or person must file written submissions with the Board, and

deliver them to the other parties (addresses of the parties appear in the Registrar's letter that was posted with the Board's decision of February 23, 1998) so that they are received within five days (not including weekends and holidays on which the Board is closed) of the date on which the vote is taken.

Accordingly, the second basis on which Local 11 challenges the vote results is clearly out of time.

7. In addition to being untimely, it is my determination that even if Local One did engage in the alleged conduct, it was not improper and accordingly there is no need to enquire into Local 11's allegations. The essence of Local 11's allegation is that Local One left phone messages for members who "were told who it was that was calling and then they would explain the voting locations, times and what the ballot would look like. In the explanation of the ballot it was stated that C.U.P.E. Local One was the first name on the ballot and 'you will place an X in that box'". Further, Local 11 cites an example of a student who attended at the poll visibly agitated and indicated that she had been called four times in the past half hour and told she had to vote. The student was informed by the returning officer that she did not have to vote if she did not want to. She left without voting. I see nothing improper in the communication left on members' answering machines. The vote conducted was a secret ballot vote at which members were free to express their true wishes. The actions of the student indicate that, although members may have felt pressured to show up and vote, they were still free to exercise their right not to do so. In the context of the secret ballot votes which were conducted in this case, there is simply nothing in Local 11's allegations which causes me to suspect that members were denied the opportunity to express their true wishes in the votes which took place on March 24, 25 and 26, 1998.

8. For the reasons set out above, it is my determination that the Board will not enquire into any of the objections raised by any of the parties to the results of the votes which were conducted on March 24, 25 and 26, 1998. I am satisfied that the results of the votes reflect the true wishes of the majority of the employees in the bargaining units.

9. Accordingly, having regard to the results of the votes, I declare that Canadian Union of Public Employees, Local One represents the employees in the following two bargaining units:

INSIDE EMPLOYEES (this unit includes all bargaining unit employees currently described as 'inside', 'salaried', or 'unit 2' under their respective existing collective agreements)

OUTSIDE EMPLOYEES (this unit includes all bargaining unit employees currently described as 'outside', 'hourly', or 'unit 1' in their respective existing collective agreements).

All bargaining rights with respect to employees in the above-noted two bargaining units held by any bargaining agent other than Canadian Union of Public Employees Local One are hereby terminated.

10. The Registrar will destroy the ballots cast in the votes taken in this matter following the expiry of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

11. The Toronto Hydro-Electric Commission is directed to post copies of this decision in all locations where it previously posted materials relating to this application. These copies are to remain posted for a period of 30 days.

0741-98-PS Toronto Civic Employees' Union, Local 416 Canadian Union of Public Employees, Applicant v. Corporation of the City of Toronto (in its own capacity and c.o.b. as the **Toronto Public Parking Authority**), Responding Party v. Canadian Union of Public Employees, Local 79, Intervenor

Public Sector Labour Relations Transition Act - Interim Relief - Practice and Procedure - Remedies - Applicant union asking for interim relief under section 37(7) of Public Sector Labour Relations Transition Act (PSLRTA) in respect of recruitment by Toronto Parking Authority of persons currently employed by City of Toronto - Union alleging that responding parties undermining negotiation process under PSLRTA - Board finding that it has jurisdiction under PSLRTA by virtue of sections 3, 4 and 5 of the Act - Board holding that conduct of Toronto Parking Authority and City of Toronto not inconsistent with PSLRTA - Board concluding that its rules of procedure regarding interim orders apply to applications under section 37(7) of the PSLRTA, that the failure of the applicant to file a copy of its intended main application amounted to non-compliance with the rules, but that it was appropriate to relieve against the failure to comply with the rules in this case - Board to reconvene consultation to hear submissions with respect to balance of harm, convenience or prejudice that might flow from granting or withholding interim relief sought

BEFORE: *Kevin Whitaker*, Vice-Chair.

APPEARANCES: *Judith McCormack, Brian Cochrane and Bob Toop* for the applicant; *George Monteith and Mark Bromley* for the City of Toronto; *John Saunders, William LeMay, Barry Martin, Ian Maher and Gerard Daigle* for the Toronto Parking Authority; *Pierre Sadik, Fred Taylor and Muriel Collins* for the intervenor.

DECISION OF THE BOARD; June 1, 1998

I

1. This is an application for interim relief pursuant to section 37(7) of the *Public Sector Labour Relations Transition Act, 1997* (the "PSLRTA"). The application was filed on May 25, 1998. A consultation was convened to hear the parties' submissions on May 28, 1998. The consultation was convened pursuant to the Board's interim Rule 108(w) with respect to applications under the PSLRTA.
2. The applicant is the successor trade union to fifteen locals of the Canadian Union of Public Employees. Those fifteen locals represented approximately 9,000 employees of seven municipalities prior to the incorporation of the new City of Toronto (the "City") on January 1, 1998. The responding parties have extended voluntary recognition to the applicant as the successor to those fifteen locals.
3. The subject matter of this application concerns employees currently employed by the City who are involved in some way with the provision of parking services. The respondent Toronto Parking Authority ("TPA") has begun to recruit to employment, persons currently employed by the City. The applicant does not recognize any practical distinction between the two responding parties and argues that they should be treated as one and the same for the purposes of this application. The applicant's challenge to the recruitment of employees TPA is that it pre-empts the process contemplated under the PSLRTA for the determination of issues which are addressed by sections 20 to 23 of that act.
4. At the consultation, the parties made submissions with respect to two issues:
 - (i) has the application for interim relief been filed in accordance with the

Board's Rules of Procedure, and if not, should the Board exercise its discretion to relieve against strict compliance with the Rules; and

(ii) in the circumstances of this case, does the Board have jurisdiction?

5. The parties made no submissions with respect to the balance of harm, convenience or prejudice that might flow from granting or declining to grant the relief sought. It was understood that this issue would be dealt with subsequently if I determined that the Board has jurisdiction to grant the application.

6. Having regard to the material filed and the information provided by the parties at the consultation, I find the following:

- (i) the Board has jurisdiction in this case;
- (ii) the responding parties have not acted in any way which would appear to be inconsistent with the scheme of the PSLRTA;
- (iii) the application for interim relief has not been filed in accordance with the Board's Rules;
- (iv) relief against the strict application of the Rules should be granted in these circumstances and the application is not dismissed despite my finding in (iii) above.

7. The consultation in this matter will be reconvened on Friday, June 5, 1998 at 9:30 A.M. in the "Boardroom" at 400 University Avenue.

8. The following brief reasons are provided for the purposes of assisting the parties in resolving the balance of this application by agreement or failing that, to clarify the issues left to be adjudicated at the reconvened consultation.

II

9. On January 1, 1998, the constituent municipalities of the former Municipality of Metropolitan Toronto, were reconstituted as one new municipal entity (the City). This happened by operation of section 2(1) of Bill 103 (the *City of Toronto Act, 1997*). As a result, seven municipal entities were merged into one.

10. On January 1, 1998, the Parking Authority of Toronto ("PAT") and the Parking Authority of North York ("PANY") were dissolved and a new entity, the Toronto Parking Authority ("TPA") was established. This happened by operation of sections 88 and 89 of Bill 148 (the *City of Toronto Act, (2) 1997*).

11. Prior to January 1, 1998, parking services for the member municipalities of Metropolitan Toronto other than the cities of Toronto and North York were delivered by the municipalities directly and not through a parking authority.

12. In North York, PANY appears to have delivered all parking services, but had no employees formally. The applicant takes the position that although persons who delivered parking services in North York were nominally employees of the City of North York, PANY exercised "employer-like" control over the terms and conditions of employment and for that reason should be considered as their employer.

13. In the old City of Toronto, parking services were delivered in part by PAT and in part by the city directly.
14. The applicant or its predecessor held bargaining rights for persons employed by PAT. There was a distinct bargaining unit for employees of PAT with a corresponding collective agreement between the applicant and PAT.
15. After January 1, 1998, there remains one Municipal entity (the City), and one "board" (as that term is used in the PSLRTA) responsible for the delivery of parking services in the City, (TPA).
16. After January 1, 1998, both the City and TPA delivered parking services. For example, the City delivered "on-street" and "boulevard" parking services, while TPA was responsible for "off-street" parking services.
17. Members of the applicant employed by the City in the provision of parking services are covered by the collective agreements between the City and the applicant. Members of the applicant employed by TPA are in a bargaining unit of TPA employees only and covered by a collective agreement between the applicant and TPA.
18. On February 6, 1998, the City passed By-law 28-1998 pursuant to section 90 of Bill 148. The effect of the By-law was to permit the transfer to TPA of those parking functions which were at the time, being administered directly by the City (for example, on-street parking).
19. On May 11, 1998, the Directors of TPA agreed to assume the work formerly done by the City which was the subject of the transfer in By-law 28-1998. On May 13, 1998, the applicant was advised of this acceptance by TPA of work, pursuant to By-law 28-1998.
20. By letters dated May 19, 1998, TPA wrote to members of the applicant employed in parking functions by the City, inviting them to consider employment with TPA. TPA intends to fill approximately 40 positions by recruiting members of the applicant employed by the City. Persons hired in this way will according to TPA, be covered by its collective agreement with the applicant and not by the collective agreements which currently apply to these persons. Despite this fact, TPA is prepared to respect the seniority of persons currently employed by the City. This recruitment will take place in the very near future.
21. It is implicit that once TPA has accomplished their recruitment, positions currently held by the applicant's members employed by the City in parking functions will become redundant. Members of the applicant left in those positions who do not seek employment with TPA will be in a position to exercise whatever job security rights they are entitled to under their respective collective agreements.
22. Throughout the period of time during which these events have occurred, the City has been involved in negotiations with the applicant and other bargaining agents (including the intervenor) in an effort to resolve the issues dealt with under sections 20 to 23 of the PSLRTA.
23. The applicant and the intervenor take the position that the actions of the respondents have pre-empted and therefore undermined the negotiation process contemplated by the PSLRTA for purposes of resolving issues dealt with by sections 20 to 23 of the legislation.
24. Although this is not disclosed in the application as filed, the applicant asserted at the consultation that if it is necessary to bring the application which is only intended at this point, the applicant will be seeking an "all employee" bargaining unit that includes employees of both the City and TPA.

III

Jurisdiction

25. Section 5(1) of the PSLRTA states:

5. (1) This Act applies upon the establishment of a local board of the new City of Toronto to which the employees of one or more local boards of the old municipalities are transferred during the transitional period.

(2) For the purposes of this Act, the local boards of the old municipalities are the predecessor employers and the local board of the new city is the successor employer.

(3) For the purposes of this Act, the changeover date is the earliest date on which employees are transferred to the local board of the new city.

26. In order to fall within section 5(1) of the PSLRTA, two criteria must be satisfied. Firstly there must be the establishment of a local board of the City. This has happened. Secondly, there must be a transfer of employees from at least one of the old local boards to the new local board (...one *or* more...). This has happened.

27. It is also the case that the events described in sections 3(a) to (d) and 4(2) have occurred. For these reasons, the PSLRTA applies with respect to *these parties* without addressing the question of which discrete transactions may determine the outcome of the process of negotiation and if necessary, litigation contemplated by the statute.

28. The number and description of bargaining units and the identity of bargaining agents with respect to both respondents, remains subject to final agreement and/or determination pursuant to sections 20 to 23 of the PSLRTA. It is the fact that these fundamental questions remain outstanding and unresolved which lies behind the applicant's concerns about the respondents' conduct at this point in time.

29. There is little doubt that the Board would have jurisdiction over the applicant's intended application, should it be brought. In these circumstances, the Board would have the authority to examine the *process* currently underway between the parties in which the issues of bargaining units, their descriptions and the identity of bargaining agents are being determined. As part of this review, the Board would have the jurisdiction to consider whether the parties generally have acted in accordance with the act *and* also whether the process contemplated by the PSLRTA has been compromised by the conduct of any party.

30. As this application and potentially the applicant's intended application arise only as a result of this process, I find that the Board has jurisdiction in the circumstances of this application to consider whether it should exercise its interim relief powers. In other words, the question of whether the Board has jurisdiction in this application does not necessarily turn on whether the respondents have in fact, breached the PSLRTA. Rather, the Board has jurisdiction if the issues raised by the applicant flow from the process which may result in the applicant's intended application.

Conduct of the Responding Parties

31. Extensive argument was made at the consultation concerning the characterization of the transactions which form the factual basis of this application. The central issue joined by the parties is whether there is one ongoing fluid movement of work and employees as the applicant and intervenors suggest, or alternatively as the respondents argue, are there three very discrete and separate transactions according to the categories established by the PSLRTA.

32. In view of the urgency of this matter I will provide my conclusions only on this point and not set out my reasoning at this juncture. I find that the responding parties' submissions on this issue are correct and that for the purposes of the PSLRTA, there have been three discrete transactions. The responding parties' theory of what has happened to this point is consistent with the scheme of the PSLRTA. I find that on May 11, 1998, there was a transfer of work from the City to the TPA. In the absence of a determination that there has been a sale of a business or that the responding parties are related employers, I find that the recruitment of the applicant's members to employment with the TPA is just that - recruitment - and not a transfer of employees.

33. For these reasons, I find that the conduct of the responding parties does not appear in any way to be inconsistent with the PSLRTA.

Filing of this Application

34. Rule 108b of the Board's Interim Rules with respect to the PSLRTA state:

108b. These rules apply to applications under the *Public Sector Labour Relations Transition Act, 1997*. They amend the Board's Rules of Procedure, which continue to apply, except to the extent that they conflict with these interim rules.

35. Rule 87 of the Board's Rules dealing with an application for interim relief requires the applicant to file at the time of the application for interim relief a copy of the application that the applicant intends to file and to state when it intends to file it.

36. I find that Rule 87 applies in this case and that the applicant has not complied with that Rule. I also find however that the Board should in these circumstances grant the applicant relief against strict compliance with Rule 87.

37. My reasons for granting this relief include the following:

- (i) this is the first application for interim relief under the PSLRTA and this issue has not been expressly determined before;
- (ii) there is arguably some ambiguity about the requirement to file the intended application having regard to the interaction of the Board's Rules and Interim Rules regarding the PSLRTA;
- (iii) despite the applicant's failure to file a copy of an intended application, the respondents appear to understand very clearly the issues that need to be addressed in this application for interim relief;
- (iv) given the nature of the dispute between the parties, there is a labour relations purpose to be served in adjudicating the issues raised at this point having heard argument.

IV

What is left to decide?

38. Despite the fact that I have decided that the responding parties appear to have acted in accordance with the PSLRTA, I am not prepared to say at this point that this finding means that the Board is precluded from granting the relief sought by the applicant. The role of the Board under the PSLRTA may arguably include the responsibility to ensure the viability of the process of negotiation

and litigation contemplated by sections 20 to 23 of the legislation. If this matter is not settled by agreement and the consultation is reconvened, the parties should be prepared to address this last point. The parties should also be prepared to deal with the issues remaining concerning prejudice, harm and convenience.

3782-97-U United Brotherhood of Carpenters and Joiners of America, Local 1072, Joe Almeida, and Cathy Smith, Applicants v. United Brotherhood of Carpenters and Joiners of America on their own behalf and as Trustee of United Brotherhood of Carpenters and Joiners of America, Local 1072, Responding Party v. United Brotherhood of Carpenters and Joiners of America, Local 1072, Intervenor

Construction Industry - Trade Union - Trusteeship - Unfair Labour Practice - Local union and certain individuals alleging that continued exercise of supervision or control over local after expiration of trusteeship imposed earlier violating section 89 of the Act - Board dismissing application for failure to make out prima facie case

BEFORE: *Robert Herman*, Alternate Chair.

APPEARANCES: *L. A. Richmond* and *J. Almeida* for the applicants; *Harold F. Caley* and *F. Manoni* for the responding party; *Marisa Pollock* and *Tony Ornelas* for the intervenor.

DECISION OF THE BOARD; May 14, 1998

1. This is an application filed pursuant to section 96 of the *Labour Relations Act, 1995* alleging a breach of section 89 of the Act. The applicants seek to challenge the continued exercise of supervision or control over Local 1072 (they allege) after a trusteeship earlier imposed has expired.

2. In the decision provided orally at the conclusion of the hearing, the application was dismissed, for failing to disclose a *prima facie* case. The Board's written reasons for that decision follow.

3. Section 89 of the Act reads as follows:

89. (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within 60 days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than 12 months from the date of such assumption, but such supervision or control may be continued for a further period of 12 months with the consent of the Board.

4. The application arises in the context of a dispute between the United Brotherhood of Carpenters and Joiners of America (the "International", or "United Brotherhood") and Local 1072 of the International, or at least, some individuals associated with Local 1072, Joe Almeida and Cathy Smith.

5. This application is not the first complaint made to the Board about the ongoing feud between these two unions, or some of their members. Local 1072 and Almeida (but not Smith) filed an earlier application with the Board, challenging a trusteeship imposed by the International, and alleging a breach of, amongst other sections, section 149 of the Act. In a decision issued October 29, 1997 ([1997] OLRB Rep. Sept./Oct. 942), the Board concluded that the "Bill 80" provisions of the Act (sections 145-150) were not available to Local 1072, as that Local did not qualify as a "trade union" within the meaning of section 126 of the Act, a prerequisite to the bringing of such an application. That application was ultimately dismissed.

6. The instant application was filed on January 15, 1998. In addition to naming as applicants Local 1072 and Joe Almeida, the same two applicants from the previous application, Cathy Smith was also named as an applicant.

7. The applicants assert that Local 1072 was placed under trusteeship effective December, 1996, by the General President of the United Brotherhood, and Frank Manoni was appointed to be the supervisor for Local 1072. At the time of the imposition of the trusteeship, Almeida was the Acting President and Business Manager of Local 1072, and Smith was the Vice-President.

8. The applicants submit that on December 4, 1997, a business representative of Local 1072, acting under the authority of Manoni, sent a Convention call to members of Local 1072, setting up a meeting for December 20, 1997, at which there would be an opportunity to nominate and elect officers of Local 1072. Almeida attended at that meeting and indicated that he would be seeking the nomination of Business Manager. Upon learning that Almeida intended to run for election, Manoni cancelled the elections and told Almeida that he was not eligible to run. Immediately after the meeting, it is asserted, Manoni purported to have appointed an Executive Board for Local 1072. Manoni did not indicate when elections might be held.

9. With respect to the trusteeship imposed on December 17th, 1996 (there may be some dispute as to whether the trusteeship was imposed on December 17th, or two days later, on December 19th, but nothing turns on this), no application for an extension of that trusteeship has been filed with the Board, whether prior to or after December 17, 1997. Nor is it asserted by any of the parties that the International has in any formal manner sought to extend its trusteeship of Local 1072 beyond one year from December 17, 1996. The applicants do assert that Manoni and the United Brotherhood continue to exert "*de facto*" or actual control or supervision over Local 1072, even though more than one year has passed since the imposition of the trusteeship, and even though the Board has not given permission for an extension of that trusteeship beyond its initial one year period.

10. The applicants allege that the above described actions are in breach of section 89 of the Act. By way of relief, they seek a declaration that the trusteeship ended on December 17, 1997, and is of no force and effect thereafter, an order reinstating the Executive Board and Business Manager of Local 1072, as they existed on December 16, 1996, and an order that the International, and its agents, officers, employees and representatives cease and desist from exerting any supervision or control over Local 1072, and any other relief as may be appropriate.

11. At the commencement of the hearing, there was a dispute over Local 1072's position in this application, and who was entitled to speak on its behalf. Local 1072 is named as an applicant in the application form, and Mr. Richmond advised that he appeared on its behalf, and on behalf of the other two named applicants. Appearing on the instructions of the Acting President of Local 1072, Ms. Pollock asserted she represented Local 1072, and Local 1072 objected to being named as an applicant, and objected to Mr. Richmond purporting to speak on its behalf. For ease of reference, as two groups claim to speak for Local 1072 and take different positions, the style of cause and appearances set out above identify Local 1072 as an applicant, since it is named as such in the application, and as an intervenor,

referring to it as represented by Ms. Pollock. There is no other significance to be attached to the fact that Ms. Pollock's client is noted as an intervenor.

12. As do the other parties, the intervenor agrees that the formal trusteeship has ended. It notes that the instant application was filed after the expiry of the trusteeship, but without the permission of Local 1072, and without its authorization or instructions to name it as an applicant. Since no trusteeship was in effect when this application was filed, the Acting President of Local 1072 is the officer entitled to speak on its behalf. He has not, it is asserted, authorized the filing of the instant application.

13. It was unnecessary for the Board to deal with this dispute over who was entitled to speak for Local 1072, and whether it was properly named as an applicant, since the Board was in any event able to deal with the preliminary issue of whether a *prima facie* case existed. Whoever was authorized to speak for Local 1072, Almeida and Smith were entitled to speak for themselves, and were themselves applicants. Therefore, the question as to whether a *prima facie* case existed would not be affected by the resolution of the issue over Local 1072's standing and who spoke for it.

14. The Board turns now to the question of whether a *prima facie* exists. In considering this issue, the Board accepted the facts as pleaded by the applicants.

15. The facts of particular relevance can be easily summarized. A trusteeship was imposed on December 16, 1996. The International took no formal or legal steps under its constitution or otherwise to extend that trusteeship beyond one year after it was imposed, nor did any party request of the Board that the trusteeship be extended beyond one year from its imposition. Notwithstanding this, the International (through the actions of Manoni and others) has in fact continued to act as if the trusteeship was still legally in effect.

16. Do these facts raise an arguable case that there has been a breach of section 89 of the Act? They do not.

17. The applicants argue that section 89 applies not only to "trusteeship" contexts, but to all scenarios where a trade union has "assumed supervision or control" over a subordinate trade union. Thus, the applicants assert, section 89(2) of the Act applies on its face to the *de facto*, but unlawful, supervision or control of Local 1072 that continues to be exerted by the International. Section 89 gives the Board an authority to inquire into complaints, they submit that a union is being supervised or controlled without a formal trusteeship or receivership (or any other form of supervision or control) having been imposed or exercised.

18. The language of sections 89(1) and (2) illustrates the limited role to be played by the Board in supervising internal union events in these contexts. There is nothing novel in this proposition.

19. The union initiating the supervision need not, and indeed cannot, ask the Board for permission or authority to impose the supervision. Section 89(1) does not give the Board authority to approve or disapprove of the trusteeship first imposed, nor any authority to monitor the trusteeship during its first twelve months. The very limited role of the Board when the trusteeship is first imposed is clear: the Board can ensure that the supervising union has filed the information required by section 89(1), or that further information, as the Minister may require, is also filed.

20. Under section 89(2), when or if the union that imposed the supervision or control requests of the Board an extension beyond the initial twelve month period of the supervision, the Board has a discretion to approve continuation of the supervision for a further period of twelve months. Without the Board's consent to extend, the effect of section 89(2) is that the supervision is automatically terminated twelve months after it was imposed. Section 89(2) is mandatory in this respect, and the supervision

ends automatically, by operation of law, if consent is not granted by the Board. There is no requirement for a union, or anyone, to file an application with the Board to terminate a trusteeship at the expiry of twelve months after it was imposed. Such an application would be redundant, since the trusteeship terminates without Board intervention, through the operation of section 89(2).

21. With one recent exception, the Board's jurisprudence reflects this approach: see, for example, *Local Union 1946 of the United Brotherhood of Carpenters and Joiners of America*, [1976] OLRB Rep. Feb. 10; *Operative Plasterers' and Cement Masons' International Association of the U.S.A. and Canada*, [1978] OLRB Rep. Mar. 223; *Canadian Chemical Workers Union, Local 28*, [1978] OLRB Rep. June 499; *United Brotherhood of Carpenters and Joiners of America*, [1980] OLRB Rep. Oct. 1568; *International Association of Bridge, Structural and Ornamental Iron Workers*, [1992] OLRB Rep. May 584 and *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. Apr. 244.

22. The single exception would appear to be the recent decision in *Local 10 of the International Union of Bricklayers and Allied Craftworkers* (Board File No. 2334-96-T dated October 7, 1997, unreported), where in a short decision the Board wrote as follows:

1. This is an application brought by International Union of Bricklayers and Allied Craftworkers ("International") requesting that the Board extend the receivership imposed on the International Union of Bricklayers and Allied Craftworkers, Local 10 pursuant to section 89(2) of the *Labour Relations Act, 1995* ("Act").

2. A hearing was held on September 29, 1997 and at the end of the hearing the Board made the following oral decision which is reproduced below:

1. This is an application brought pursuant to section 89(2) of the *Labour Relations Act, 1995*, requesting that the supervision be continued until a decision is made in Board File No. 1689-96-U.
2. The receivership has for the past eight months concerned itself with periodic meetings between the International Union and the Local to review the financial situation of Local 10.
3. The International's request is made in the context of the fact that since at least August 1996 the Local has run its financial affairs in a proper manner.
4. The application arises in an unusual set of conditions in that the Bill 80 case in Board File No. 1689-96-U is ongoing. It is that case which will deal with all the issues that led to the supervision in the first place.
5. In light of all the circumstances in the case before me and in particular to allow Vice-Chair Petryshen who is hearing the case in Board File No. 1689-96-U all the latitude to deal with any and all remedies if any in the case before him, I would limit the supervision to one meeting every two months to deal with financial issues only. These meetings may be cancelled on a consent basis between the parties.
6. This order is to run until the issuance of the decision by Vice-Chair Petryshen in Board File No. 1689-96-U.

3. Should the parties request an elaboration on the reasons above they may do so after the release of the decision in Board File No. 1689-96-U.

23. This decision is of little assistance, as it does not set out the factual context of the issue, nor does it offer any guidance as to the jurisdictional basis for the orders made therein.

24. By virtue of section 89(2), the trusteeship in question automatically ended twelve months after it was first imposed. The instant application was brought after the trusteeship was thus terminated. There can therefore be no arguable case for the application of sections 89(1) or (2). If the United Brotherhood continues to exert *de facto* control or supervision over Local 1072, it is doing so without the authority of a legally imposed trusteeship, supervision or control. The Board notes that the United Brotherhood has not asserted or claimed in this application any legal entitlement to exercise *de facto* supervision or control, beyond the expiry of the twelve month period after December 17, 1996.

25. For these reasons, the application was dismissed.

0404-98-R Elie Khalife, on his own behalf and on behalf of a group of employees of West-Way Taxi Nepean Ltd., Applicant v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688, Responding Party v. **Westway Taxi Nepean Ltd.**, Intervenor

Conciliation - Termination - Timeliness - Reconsideration - Employee filing termination application more than 12 months after conciliation officer appointed, but Minister not yet having issued "no board" report - Board concluding that termination application untimely under section 67(2) - Termination application and reconsideration application dismissed

BEFORE: *Christopher J. Albertyn*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

DECISION OF VICE-CHAIR CHRISTOPHER J. ALBERTYN AND BOARD MEMBER D. A. PATTERSON; June 18, 1998

1. This is a reconsideration request of a decision dismissing a termination application because it was untimely, having regard to the provisions of subsection 67(2) of the *Labour Relations Act, 1995* ("the Act").

2. The Board dismissed the termination application in a decision on May 25, 1998. At the time of making the decision the Board did not have the benefit of the representations which were made by the applicant in respect of the timeliness of the application. The Board now has those representations.

3. Collective bargaining between the responding union ("the Union") and West-Way Taxi Nepean Ltd. ("the Employer") reached impasse and the appointment of a conciliation officer was sought, and granted on March 24, 1997. This termination application was filed on April 28, 1998, more than 12 months after the appointment of a conciliation officer. No conciliation board or mediator has been appointed and the Minister has not informed the parties that he does not consider it advisable to appoint a conciliation board.

4. Subsection 67(2) of the Act reads as follows:

67. (2) Where notice has been given under section 59 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least 12 months have elapsed from the date of the appointment of the conciliation officer or a mediator;
- (b) a conciliation board or a mediator has been appointed and 30 days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) 30 days have elapsed after the Minister has informed the parties that he or she does not consider it desirable to appoint a conciliation board,

whichever is later.

5. Only paragraph (a) of what is contemplated in subsection 67(2) has occurred. Paragraphs (b) and (c) are alternatives. Neither has yet occurred. The applicant submits that paragraphs (b) and (c) apply only in instances where the events referred to therein have occurred (i.e. where a conciliation board or mediator has been appointed, or where a no-board report has been released). The applicant suggests that as neither of these events have occurred, neither paragraph (b) or (c) is capable of operation. Therefore, on this argument, only paragraph (a) has relevance and the application satisfies the 12 month requirement of paragraph (a).

6. The applicant contends that this interpretation stands to reason because it lies in the hands of the Union (and the Employer) to request a no-board report. The applicant suggests that the Act does not intend a trade union to be able to protect itself from decertification indefinitely, simply by failing to request a no-board report. Assuming no conciliation board or mediator will be appointed, the outer limit for the "closed" period is, on this submission, 12 months from date of the appointment of a conciliation officer, plus a further 30 days if a no-board report is issued immediately thereafter. The applicant contends that in the absence of the no-board report, then the outer limit of the closed period is 12 months, which would make the application timely.

7. The Union takes a different view. It contends that the closed period remains operative until the later of the happening of the events contemplated in paragraphs (a) *and* (b) or, more likely, in paragraphs (a) *and* (c).

8. We are in agreement with the Union's contention. Subsection 67(2) ends with the words, "whichever is later". That means that if (a) has occurred, yet neither (b) nor (c) has occurred, then the provisions of the subsection have not been fulfilled. The closed period remains in operation until the happening of one of the events contemplated in (b) or (c), which, for practical purposes, means that the closed period remains until the no-board report has been issued and a period of 30 days has expired.

9. Reading subsection 67(2) may give one the impression at first blush that paragraphs (a), (b) and (c) are alternative to each other; that the "or" at the end of paragraph (b) applies also to paragraph (a). That impression would be mistaken. It fails to recognize that the addition of the words "whichever is later" contemplates the happening of two events, not one, and it fails to have regard to the manner in which the conciliation process operates under the Act.

10. Subsection 67(2) contemplates the happening of two events. Those events are: the appointment by the Minister of a conciliation officer (or mediator) - the provision of paragraph (a); and, one or other of (b) and (c). Paragraph (b) is necessarily alternative to (c) - in (b) the Minister has appointed a conciliation board, in (c) he does not. The addition of the words, "whichever is later" necessarily implies that two different things have happened in some sequence to each other. The events contemplated in paragraphs (b) and (c) cannot both occur. The one is the categorical opposite of the other. If the one occurs, the other does not. Hence, what the subsection contemplates is that (a) will occur, i.e. there will be the appointment of a conciliation officer and 12 months will elapse thereafter, and then (b) or (c)

will occur; or (b) or (c) will occur first, and then (a) will occur. Therefore both events, the later of which is relevant for the purposes of determining the (second) open period (the first being the last 2 months of the previous collective agreement), must occur for the open period to revive. In short, the subsection is properly read as if there were the addition of the word “and” after paragraph (a).

11. To all intents and purposes (given how seldom a conciliation board is appointed), normally a no-board report (i.e. that of paragraph (c)) will be issued before the expiry of 12 months, in which event the 12 months stipulated in (a) will be the trigger for the open period. But in exceptional cases, such as this, when no no-board report has issued, and the event contemplated in (a) has happened, the open period must await the issue of the no no-board report contemplated in (c). As stated, *both* events are necessary.

12. This interpretation of the alternative nature of (b) and (c) is borne out by reference to other provisions in the statute. Section 21 reads:

21. If the conciliation officer is unable to effect a collective agreement within the time allowed under section 20,

- (a) the Minister shall forthwith by notice in writing request each of the parties, within five days of the receipt of the notice, to recommend one person to be a member of a conciliation board, and upon the receipt of the recommendations or upon the expiration of the five-day period he or she shall appoint two members who in his or her opinion represent the points of view of the respective parties, and the two members so appointed may, within three days after they are appointed, jointly recommend a third person to be a member and chair of the board, and upon the receipt of the recommendation or upon the expiration of the three-day period, he or she shall appoint a third person to be a member and chair of the board; or
- (b) the Minister shall forthwith by notice in writing inform each of the parties that he or she does not consider it advisable to appoint a conciliation board.

That means that, if a conciliation officer appointed to assist the parties with their collective bargaining is unable to effect a collective agreement between them, then the Minister does one of two things: he either appoints a conciliation board or he issues a no-board report. The same is true of section 79(2), which reads:

79. (2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 122(2) to have released to the parties the report of a conciliation board or mediator; or
- (b) 14 days have elapsed after the day the Minister has released or is deemed pursuant to subsection 122(2) to have released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

Lawful industrial action is delayed until the happening of one or other event: the appointment or non-appointment of a conciliation board and the expiry of the stipulated number of days.

13. Sections 21 and 79(2) support the interpretation given above. Paragraphs (b) and (c) of subsection 67(2) are to be read as alternatives, and paragraph (a) is to be read as additional to one or other of them.

14. Subsection 67(2) is applicable where there is an *established* collective bargaining relationship and the bargaining parties are attempting to negotiate a new collective agreement. In other words, there has already been an open period during the last two months of the former collective agreement, when unhappy employees had the opportunity to oust their union. The appointment of a conciliation officer cannot close that open period. In that context it is not surprising that the statute forecloses another opportunity to mount a challenge until government assistance to the bargaining process is formally completed by the event described in (b) or (c). The fact that the Minister has not moved within the times prescribed in sections 20 and 21 is not unusual because bargaining is seldom completed in such short periods. It is also irrelevant to the time periods stipulated in subsection 67(2). That subsection is designed to allow the conciliation process to take its course until it is wholly complete.

15. The Act provides for a careful balancing of conflicting interests. Part of that balance is that established collective bargaining relationships can be renewed, after an open period during which the union's continued bargaining rights are briefly in jeopardy, through a process of negotiation and, if necessary, conciliation and/or mediation, without the union concerned having to face a displacement or decertification challenge. Another part of the balance is that employees have opportunities to terminate the union's bargaining rights during designated open periods, which are positioned so as to accommodate on-going collective bargaining. The open periods are during the last two months of the expiring collective agreement and after the collective bargaining process is complete, i.e. once the later of the two events contemplated in subsection 67(2) has occurred. (See *Teamsters Local 91* [1990] OLRB Rep. Jan. 89 and *Connie Steel Products Ltd.* [1987] OLRB Rep. Oct. 1225).

16. In the circumstances the Board will not reconsider its earlier decision.

17. Board Member Ronson stands by his previous dissenting decision.

DECISION OF BOARD MEMBER J. A. RONSON; June 18, 1998

At a time when the legislature is focusing the Board on the wishes of employees and workplace democracy - this is a decision that doesn't.

3146-97-R; 3149-97-R; 3150-97-R; 3186-97-PS Canadian Health Care Workers ("CHCW"), Applicant v. **The Women's Christian Association of London ("WCA")**, Responding Party v. London & District Service Workers' Union, Local 220 ("SEIU" or "the incumbent union"), Intervener v. St. Joseph's Health Centre, Interested Party; London and District Service Workers' Union, Local 220 ("SEIU"), Applicant v. The Women's Christian Association of London ("WCA") and St. Joseph's Health Centre ("St. Joseph's"), Responding Parties, v. Canadian Health Care Workers ("CHCH") and Ontario Nurses' Association ("ONA"), Interveners

Certification - Public Sector Labour Relations Transition Act - CHCW applying to represent bargaining unit of service workers employed by WCA and already represented by SEIU - SEIU subsequently filing application under Public Sector Labour Relations Transition Act ("PSLRTA") and asking Board to exercise its discretion to find that that Act applies under section 9 of the Act - SEIU also asking Board to establish "changeover date" retroactive to a date preceding the certification application date - SEIU asking Board to find that certification application made by CHCW barred under section 28(4) of PSLRTA - Board declining to find that

PSLRTA applies or that certification application would be barred, if it did - Application under PSLRTA dismissed - Board directing that ballots cast in certification application be counted

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *E. D. Coetzee* for the “CHCW”; *Stephen Krashinsky* for the “SEIU”; *Brian O’Byrne* for the “WCA”; *Frank Angeletti* and *Robert Landry* for “St. Joseph’s”; *Gail Sax* for “ONA” (taking no position in these proceedings).

DECISION OF THE BOARD; May 12, 1998

INTRODUCTION: WHAT THIS CASE IS ABOUT - IN GENERAL

1. This decision deals with the relationship between a certification application filed by the CHCW under the *Labour Relations Act, 1995*, and a later application filed by the SEIU under the *Public Sector Labour Relations Transition Act, 1997* (“Bill 136”). The chronology is fairly simple: Bill 136 came in to force on *October 29, 1997*; the CHCW filed its certification application on *November 21, 1997*; and the SEIU filed a Bill 136 application, in response, on *November 25, 1997*. The Board is being asked to determine whether the certification matter can still proceed, given the later filing of the Bill 136 application. And that, in turn, requires the Board to consider the relationship between the *Labour Relations Act* and Bill 136.

2. It may be useful to begin by briefly describing what the certification proceeding is about.

* * *

3. In its application for certification, the CHCW seeks to represent a grouping of service employees, who work at the “Parkwood Hospital” and the “McCormick Home for the Aged” in London, Ontario. Those service employees are currently represented by the SEIU. The CHCW seeks to replace the SEIU as the employees’ bargaining agent.

4. The Board has already held a representation vote at the two facilities, so that employees can indicate whether they wish to be represented by the CHCW or the SEIU. The Board has segregated the ballots from each institution, so that the ballots can be counted separately. The balloting was conducted in this way in order to preserve the option of defining separate bargaining units for each institution, so that the employees at each location can decide, *separately*, which union they prefer. However, those ballot boxes have been sealed pending a resolution of the outstanding issues in this case.

5. The reasons for sealing the ballot boxes are set out in the Board’s decision of December 22, 1997, and will not be repeated here. It suffices to say that, a few days after the certification application was filed, the SEIU made an application under Bill 136, which, it says, prevents the CHCW’s certification applications from going forward. In view of this challenge, the Board decided to seal the ballot boxes, until the parties had an opportunity to address the SEIU’s objections.

6. Briefly put, the SEIU argues that Parkwood hospital is currently involved in a multi-institution “restructuring process” to which Bill 136 applies. At the end of that process, Parkwood will no longer be owned and operated by the Women’s Christian Association of London (“WCA”) - the named employer in the certification applications. Instead, Parkwood will become part of the St. Joseph’s Health Centre, and St. Joseph’s will replace the WCA as the employer of the service employees working at Parkwood.

7. The SEIU says that until this restructuring exercise is completed, the SEIU's status as bargaining agent cannot be challenged. Bill 136 imposes a "bar"; and the employees will simply have to wait.

8. It is not entirely clear how long the employees may have to wait, because the restructuring of these health care facilities has been ongoing since early 1997, and, I am told, may ultimately involve a number of other, formerly independent, organizations. At the end of the day, there will be fewer, larger, health care organizations in the London area. However, at this stage, it is difficult to predict what shape the restructured organizations will take, or how long it will take to complete the process. So, as a practical matter, the "bar" asserted by the SEIU may last for years.

9. The CHCW replies that there is no "bar" at all under Bill 136, either because Bill 136 simply does not apply, or because the provisions of Bill 136 do not create any legal obstacle to the CHCW's outstanding certification application, even if they do apply.

10. The CHCW argues that the Board has a *discretion* whether or not to apply Bill 136, as well as a *discretion* about *how* Bill 136 should be applied in a hospital setting; and, in the CHCW's submission, the Board should not exercise either of those discretions in a way that would derail the outstanding certification proceedings. In the CHCW's submission, its certification proceeding was first in time, and should be dealt with before considering the subsequent application under Bill 136. The CHCW urges the Board to count the ballots and dispose of the certification issues in accordance with the wishes of the employees. In the CHCW's submission, the employees should not be saddled with a union that they do not want.

11. The CHCW further argues that even if Bill 136 were made to apply, the provisions of Bill 136 do not prevent employees from changing bargaining agents in the setting here under review. A timely certification application was already filed with the Board *before* anyone sought to invoke Bill 136, and in the CHCW's submission, the certification application can proceed to a conclusion *without any conflict with any section of Bill 136* - and, indeed, *without any conflict with the policy objectives of Bill 136*. The CHCW says that the SEIU's Bill 136 reference was filed as a defensive measure, to prevent employees from changing bargaining agents. It has nothing to do with the "restructuring problems" to which Bill 136 was addressed.

12. The CHCW argues that, as a matter of interpretation, the facts of this case do not engage the provisions of Bill 136 - either generally, or specifically, with respect to the sections "barring" a certification application while a Bill 136 proceeding is underway. Quite apart from that, though, the CHCW argues that, *as a policy matter*, there is no reason to apply Bill 136 here, because there is no bargaining unit/bargaining agent restructuring issue requiring the application of Bill 136. The CHCW says that it is prepared to "stand in the shoes" of the SEIU, as bargaining agent for the bargaining units formerly represented by the SEIU, and is content to abide by all of the agreements and understandings formerly given by the SEIU. Its certification will not inhibit restructuring at all.

13. The CHCW says that its confirmation as the employees' bargaining agent will not interfere with the institutional restructuring that is currently ongoing. It will merely ensure that the nominal bargaining agent actually does represent the employees involved in that process. The CHCW says that these employee rights should prevail unless there is a clear conflict with the provisions or purposes of Bill 136, and here there is neither.

14. In summary, the CHCW maintains that Bill 136 cannot stand in the way of the certification proceeding, because the legal preconditions necessary for the application of Bill 136 have not been met. In the alternative, the CHCW says that even if Bill 136 could be made to apply, there is no conflict between Bill 136 and the certification provisions of the *Labour Relations Act*. The CHCW contends

that the employees are entitled to be represented by the union of their choice, where, as here, these employee interests can be accommodated without conflicting with the purposes or processes established in Bill 136.

SOME MECHANICS

15. The foregoing is a brief statement of “the problem” posed by the two kinds of application now before the Board. That “problem” was canvassed by counsel in their written submissions, and in a 2-day “consultation” held in late January 1998. I have used the term “consultation” because these issues were explored pursuant to section 37 of Bill 136, which reads this way:

37. (1) Subject to this section, sections 110 to 118 of the *Labour Relations Act, 1995* apply, with necessary modification, with respect to anything the Board does under this Act.

(2) Where the Board is given authority to make a decision, determination or order under this Act, it shall be made,

- (a) by the chair or, if the chair is absent or unable to act, by the alternate chair; or
- (b) by a vice-chair selected by the chair in his or her sole discretion or, if the chair is absent or unable to act, selected by the alternate chair in his or her sole discretion.

(3) The Board may authorize a labour relations officer to inquire into any matter that comes before it under this Act and to endeavour to settle any such matter.

(4) The Board has, in relation to any proceedings under this Act, the same powers to make rules to expedite proceedings as the Board has under subsection 110(18) of the *Labour Relations Act, 1995*.

(5) Rules made under subsection (4) apply despite anything in the *Statutory Powers Procedure Act*.

(6) Rules made under subsection (4) are not regulations within the meaning of the *Regulations Act*.

(7) The Board may make interim orders with respect to a matter that is or will be the subject of a pending or intended proceeding.

(8) The Board shall make decisions, determinations and orders under this Act in an expeditious fashion.

(9) A decision, determination or order made by the Board is final and binding for all purposes.

(10) Subsections 96(4), (6) and (7) and sections 122 and 123 of the *Labour Relations Act, 1995* apply, with necessary modifications, with respect to proceedings before the Board and its decisions, determinations and orders.

Section 37 incorporates sections 110(18) to (22) of the *Labour Relations Act*, which read:

110. (18) The Board may make rules to expedite proceedings to which the following provisions apply:

- 1. Section 13 (right of access) or 98 (interim orders).
- 2. Section 99 (jurisdictional, etc., disputes).
- 3. Subsection 114(2) (status as employee or guard).
- 4. Sections 126 to 168 (construction industry).

5. Such other provisions as the Lieutenant Governor in Council may by regulation designate.

(19) Rules made under subsection (18) come into force on such dates as the Lieutenant Governor in Council may by order determine.

(20) Rules made under subsection (18),

- (a) may provide that the Board is not required to hold a hearing;
- (b) may limit the extent to which the Board is required to give full opportunity to the parties to present their evidence and to make their submissions; and
- (c) may authorize the Board to make or cause to be made such examination of records and such other inquiries as it considers necessary in the circumstances.

(21) Rules made under subsection (18) apply despite anything in the *Statutory Powers Procedure Act*.

(22) Rules made under subsection (17) or (18) are not regulations within the meaning of the *Regulations Act*.

And, to complete the picture, the Board's "Bill 136 Rules" provide:

COMMENCEMENT

108a. These rules come into effect on November 1, 1997.

• • •

Manner of Filing

108k. Documents required to be filed with the Board under these rules may be filed in any manner except facsimile transmission.

Number of copies to be filed

108l. Parties must file three (3) copies of their application or response.

Verification of Delivery at time of Filing

108m. The parties must verify in writing at the time of filing that they have delivered the application or response to the other party or parties as required by these rules.

Obligation to deliver copies of all filings to all other parties

108n. In addition to applications and responses, a party filing any document or correspondence with the Board must at the same time deliver a copy of the document or correspondence to all other parties in the case. Any such document or correspondence filed with the Board must be accompanied by a statement that the party filing it has delivered the document or correspondence to all other parties as required by this Rule. The statement must also include the names and titles of the persons to whom the documents were delivered and information regarding the date, time and method of delivery.

APPLICATIONS UNDER SECTION 21, 22 or 23 OF THE ACT

108o. Unless the Board directs otherwise, Rules 12(d) and 14(d) do not apply to applications under section 21, 22 or 23 of the Act.

108p. An application under section 21, 22 or 23 of the Act (which may include a related application under section 9 of the Act) must be made on Form GG-1.

108q. The applicant must deliver the following to the responding parties before filing its application with the Board: (a) a completed copy of the application; and (b) a blank response form (Form GG-2).

• • •

GENERAL

108w. In order to expedite proceedings in an application under the Act, the Board may, on such terms as it considers advisable, consult with the parties, conduct a pre-hearing conference, issue any practice direction, shorten or lengthen any time period, change any filing or delivery requirement, schedule a hearing, if any, on short notice, or cancel a hearing, make or cause to be made such examination of records or other inquiries as it considers necessary in the circumstances, or limit the parties' opportunities to present their evidence or to make their submissions.

108x. Where the Board is satisfied that a case can be decided on the basis of the material before it, and having regard to the need for expedition in labour relations, the Board may decide the application under the Act without an oral hearing.

16. As will be seen, Bill 136 contemplates a dispute resolution process that is very different from the standard litigation model. The Board is expected to do its work quickly, and without the requirement of a traditional hearing.

* * *

17. There is not much doubt that, *but for Bill 136*, the CHCW's certification application would proceed in accordance with the *Labour Relations Act*, the ballots would be counted, and the employee wishes would probably prevail. Indeed, were it not for Bill 136, that is the way that the certification application would unfold *even if Parkwood were being (or had been) transferred from the WCA organization to the St. Joseph's organization*. That is so, because, under the *Labour Relations Act*, an otherwise timely certification application is *not* derailed merely because a "part" of the business organization is being transferred from one owner to another. The new employer is simply "plugged in" to the certification proceeding, the matter continues as before, and any "reorganization questions" are sorted out under the "successor rights" provisions of the *Act* (see below and see section 69 of the *Labour Relations Act*). So, were it not for Bill 136, the disposition of Parkwood would not affect the CHCW's certification application.

18. Nevertheless, it is certainly arguable that Bill 136 changes the situation; and, as things now stand, the new statute is completely uncharted territory. The Board has yet to consider the precise relationship between rights found in the *Labour Relations Act*, and the restructuring formula prescribed in Bill 136; and the reality is: Bill 136 may not address those issues specifically or completely - especially in an unusual situation like the present case, where the restructuring was already in progress when Bill 136 was proclaimed, where only one *part* of an institution is being transferred to a new setting, and where the certification proceeding was ongoing before any Bill 136 application was made. This case is a bit of a puzzle. That is why the Board sealed the ballot boxes pending receipt of the parties' submissions.

19. There is no doubt, though, that the applications before the Board present a rather novel mix of facts in the context of a totally new legislative regime; and, as things now stand, it is not at all clear how the two pieces of legislation fit together or potentially collide. Of course, in the event of any operating incompatibility between the two statutes, the provisions of Bill 136 must prevail (see section 39 of Bill 136). Bill 136 is paramount. But, it is not at all clear whether, in a case like this one, there actually *is* such operating incompatibility, or whether through the exercise of discretion the Board can *avoid* any collision, while, at the same time, furthering the stated purposes of *both* statutes.

20. Accordingly, given the novelty of the case, it may be useful to begin by considering how it would have unfolded under the *Labour Relations Act*, **were it not for Bill 136**. I will then look at Bill 136, to see whether the outcome *would* or *should* be different - either because Bill 136 commands a different result, or because that is what makes labour relations sense, having regard to the purposes of Bill 136 and the various discretions given to the Board under Bill 136.

THE FACTUAL SETTING - IN BROAD OUTLINE

21. The City of London has a number of health care facilities, that, historically, have been separately owned and operated. These undertakings form part of the mosaic that is now commonly described as the "broader public sector". They have a number of common features: they are all engaged in providing public services, they are all subject to various forms of public regulation, and, in many cases, they receive financial support (directly or indirectly) from the public purse.

22. In an era of fiscal restraint, governments of all stripes have begun to look for ways to improve service delivery, and make these public sector institutions more "cost effective". In the health care sector, that means the merger of hospitals, the consolidation of programs, shared service arrangements, and so on. However, these reforms "on the employer side of the bargaining table" usually have collective bargaining consequences, which may necessitate changes "on the union side of the table". That is the process to which Bill 136 is directed.

23. The City of London has not been immune from these influences. In fact, hospital reorganization has been part of the local scene for many years. The current round of "restructuring" is part of an ongoing process, which, as we shall see, began well before the passage of Bill 136.

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24. The St. Joseph's Health Centre is a broadly-based health care organization, with a religious orientation and a number of institutional components. As I understand it, the current structure of St. Joseph's reflects some previous (i.e. pre-Bill 136) reorganization, so that it now operates several different kinds of facilities at several different sites. For collective bargaining purposes, St. Joseph's is subdivided into a number of different bargaining units represented by various trade unions. Among those bargaining units are *several separate* "service units", currently represented by the SEIU.

25. It appears, therefore, that the current bargaining structure at St. Joseph's is already quite fragmented, even within the generic employee groupings that one normally finds in the hospital sector (i.e. service units, paramedical units, nursing units, etc.). There are already a number of *separate* "service units" - no doubt reflecting the fact that, at one time, the institutions now grouped together under the St. Joseph's umbrella, were once separate facilities. And all of these service units are now represented by the SEIU.

26. There is nothing in the material before me to suggest that this multiplicity of service units has generated any serious labour relations problems. There is, for example, no indication that St. Joseph's has sought to consolidate some of those service units. On the contrary, it appears that the parties have been content to live with the somewhat balkanized bargaining structure that is associated with the institutional subdivisions within the St. Joseph's organization. The absorption of Parkwood will add two more service units, that St. Joseph's plans (for the time being at least) to leave intact.

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27. Historically, the Women's Christian Association (WCA) of London has owned and operated a public hospital known as "Parkwood Hospital" and a separate home for the aged, known as the

“McCormick Home”. The service employees working at the two sites are also represented by the SEIU. But the bargaining unit configuration is a bit eccentric. One “service unit” consists of a broad grouping of workers at both geographically-separate institutions, together with the RPNs at the McCormick Home. That service unit crosses institutional lines, and covers service employees working at both sites. In addition, there is another, much narrower bargaining unit, that encompasses only the RPNs at Parkwood Hospital.

28. The CHCW’s objective is to displace the SEIU as the bargaining agent for all employees at the Parkwood and McCormick sites, now represented by the SEIU. The CHCW “wants” what the SEIU currently has; and its certification applications have been framed to secure that result.

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29. This historical status quo is fairly easy to describe. The problem is, that since early 1997, St. Joseph’s and the WCA have been working together with a view to transferring Parkwood Hospital to St. Joseph’s. This has not been a completely consensual exercise, because in June 1997, the Health Services Restructuring Commission *directed* that the WCA relinquish to St. Joseph’s the ownership, operation, management and control of Parkwood Hospital, including its programs, services, buildings and assets by *September 30, 1997*. That deadline was subsequently extended to *November 30, 1997; however by December 1, 1997, St. Joseph’s was to assume all of the funding, facilities, and functions formerly associated with Parkwood*.

30. In other words, well before the proclamation of Bill 136, St. Joseph’s and the WCA were engaged in a process designed to transfer Parkwood from the WCA organization to the St. Joseph’s organization; and that staged process included events which *might at the time* have been considered legally significant under the *Labour Relations Act* (i.e. pre-Bill 136), and *might now* be considered legally significant under Bill 136 (if the Board determines that Bill 136 applies). Moreover, the transfer and absorption of Parkwood was *still ongoing while these proceedings were before the Board*, with the result that a more complete chronology looks like this:

- *February 1997*: discussions about the Parkwood transfer begin
- *June 1997*: the Hospital Restructuring Commission orders the transfer of Parkwood by September 30, 1997 - later extended to November 30, 1997
- *September 1997*: some WCA directors join the Board of directors of St. Joseph’s
- *October 29, 1997*: Bill 136 comes in to force
- *November 21, 1997*: the CHCW files its various certification applications in respect of employees at McCormick and Parkwood
- *November 25, 1997*: the SEIU files its Bill 136 reply, raising a “bar” to the certification applications
- *November 30, 1997*: the transfer is nominally completed so that St. Joseph’s has the assets, funding and responsibilities of Parkwood (i.e. the WCA has relinquished any residual control)

31. In other words, a legally significant event - the completion of the asset transfer - (arguably a "successorship" in itself under one statute or another) may have occurred on November 30, 1997 *after* the litigation started.

32. What does one make of the fact (asserted by St. Joseph's and the WCA but questioned by the CHCW) that by September 1997, the St. Joseph's board of directors contained 10 members from the WCA, so that it might be said that, from that point, (pre-Bill 136) the St. Joseph's and Parkwood organizations were being governed at the top by a single management team? What does one make of the fact (not seriously disputed) that as of December 1, 1997, St. Joseph's was to have acquired the ownership, operations, management, funding and control of Parkwood - that is, after the proclamation of Bill 136, but also after both the certification application and the Bill 136 application were filed with the Board? What does it mean that the "purported merger" of part of the "service provider" may have occurred while these proceedings were pending before the Board; or to put the matter another way, that legally significant events may have occurred after the proceedings were launched?

33. Conversely, what is the situation at the McCormick Home, to which the pending certification applications also apply? It is not disputed that only Parkwood Hospital has been affected by the above-described "restructuring exercise". The McCormick Home continues to be operated by the WCA. But, in the circumstances, how do the certification applications now apply to the two "parts" of the once unified organization that was run by the WCA? What happens if, in the course of a certification application, "part" of the target bargaining unit is split off and transferred to another employer in a transaction to which the Labour Relations Act and/or Bill 136 may apply?

34. I should observe, parenthetically, that while these may be interesting questions under the *Labour Relations Act* or Bill 136, they did not engage the parties' attention, prior to the certification application filed by the CHCW. Until the CHCW arrived on the scene, the SEIU, St. Joseph's, and the WCA were working, step by step, towards the orderly absorption of Parkwood Hospital into the St. Joseph's organization; and there was no dispute about the resulting bargaining unit configuration. Indeed, *there was an agreement that the bargaining unit status quo would be preserved while this process was underway.*

35. This agreement or understanding to preserve the bargaining unit status quo was not reduced to writing, so I am unable to say whether the Parkwood units were to remain intact permanently, or whether this was an interim arrangement, pending a reconsideration of the bargaining unit structure at some later stage of the organizational evolution. What can be said is that a balkanized bargaining structure was not, in itself, thought to be an impediment to restructuring the two organizations. The absorption of Parkwood would merely add two more "service units" to the mix of service units already in place in the St. Joseph's organization - although, of course, at that point, all of these employees were represented by the SEIU. Nevertheless, it is difficult to resist the conclusion that whatever Bill 136 may say about "rationalizing" the bargaining structure, it has not been a dominant concern of the institutional parties in this case - at least not at this point.

* * *

36. I will return to some of these questions later. First, I will look briefly at certain features of the *Labour Relations Act*, under which the certification applications were brought. It seems to me that it may be useful to consider how this case would have unfolded under the *Labour Relations Act* before determining how the situation may have been, or may have to be, modified by Bill 136.

SOME GENERAL OBSERVATIONS ON THE SCHEME OF THE LABOUR RELATIONS ACT, AND HOW THIS CASE WOULD LIKELY HAVE UNFOLDED IF BILL 136 DID NOT APPLY.

37. Under the *Labour Relations Act*, a trade union can become the exclusive bargaining agent for a bargaining unit of employees by demonstrating that the majority of those employees want that trade union to represent them. The wishes of the employees are tested by means of a representation vote. A vote is triggered when a trade union applies for certification, and makes out a plausible case that at least 40% of the employees have an interest in being represented by that union. The Board then orders a vote to test whether the union actually does represent a majority of the affected employees.

38. If employees are unrepresented, there are very few limitations on their right to form or join a trade union. They can do so at any time. However, if employees are already represented by a trade union, they can only oust their existing bargaining agent and select a new one, towards the end of an existing collective agreement.

39. This formula is modified a little bit in the hospital sector, where interest arbitration provides the mechanism for achieving a new collective agreement. In the hospital sector, a challenge to an incumbent union must sometimes be postponed because of an ongoing arbitration proceeding. But the basic scheme remains the same: every two or three years employees will have a window of opportunity to reject their bargaining agent altogether (i.e. go non-union) or select a new trade union to represent them. The trade union's status depends ultimately upon the support of employees. For among the purposes of the *Labour Relations Act*, (listed in section 2), one finds this one:

2. The following are the purposes of the Act:

1. To facilitate collective bargaining between employers and trade unions that are the *freely-designated representatives of the employees*.

40. A fundamental premise of our collective-bargaining system is that the trade union should be the "freely-designated representative of employees". Collective bargaining is an instrument for employees to advance their position through a *trade union of their own choice*; and if employees are dissatisfied with a trade union's performance, the law allows them to "go non-union" or choose a new bargaining agent by supporting a certification application by a rival union.

41. That is what the employees have done in this case. Quite a number of them have signified their support for the CHCW, and the CHCW has applied for certification as their bargaining agent. Upon receipt of that certification application, the Board directed a representation vote, so that the employees could choose between the SEIU and the CHCW.

42. Were it not for Bill 136, the result of that certification application would in all likelihood be determined by the wishes of employees. If the CHCW won the vote, the CHCW would become the bargaining agent for the bargaining unit(s) of employees now represented by the SEIU. The CHCW would be the "freely-designated representative of the employees". Conversely, if the CHCW lost the vote, its certification application would be dismissed, and the employees would continue to be represented by the SEIU.

43. *It is important to note, however, that a "displacement certification application" (or "raid") like the one before the Board in this case, does not normally change either the number or description of the bargaining units. It merely allows the employees in those units to change their union affiliation. To put the matter another way: a raid by one union upon another has no effect on the bargaining structure - only upon the identity of the bargaining agent. The raiding union merely "takes" what the incumbent union "has", and the bargaining structure remains unchanged.*

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44. The discussion so far has focused on changes on “the union side of the bargaining table”. But the *Labour Relations Act* also contemplates the possibility of change “on the employer side”, because, from time to time, a business (or parts of it) may be sold or otherwise transferred to another business organization. If that happens, the statute provides that collective bargaining rights flow through such changes of ownership, so long as there is a continuation of the same business. Basically, the new owner steps into the shoes of its predecessor.

45. But what if the new owner is already unionized and has its own collective agreement? What if the new owner wants to intermingle employees of the two businesses, so that the inherited bargaining structure and collective agreement may no longer make sense in the new operational setting? If that happens, the Board has a discretion to sort out those problems, and has the power to redefine the bargaining unit perimeter, terminate bargaining rights, or conduct such representation votes as it considers appropriate (see generally section 69(6) of the Act).

46. Most of section 69 is concerned with the impact of business transfers on *established bargaining rights*. However, this “flow-through principle” is also triggered where there is a transfer of ownership while a certification application is pending before the Board. Section 69(2) of the *Labour Relations Act* reads, in part, as follows:

... where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, *the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.*

And section 69(1) provides:

69. (1) In this section,

“business” includes a part or parts thereof;

“sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

47. So, in summary, the *Labour Relations Act* contemplates the transfer of all or part of an organization from employer A to employer B; and meets this contingency with the flow-through formula described above. That is the approach which would have applied in this case, were it not for Bill 136.

48. If there were no business reorganization or disposition involving the WCA, the certification applications currently before the Board would be processed in the ordinary course, and, if timely (as they seem to be here) would, in all likelihood, be resolved in accordance with the wishes of employees, recorded in a representation vote. Alternatively, *if there were some kind of disposition* affecting all or part of the the WCA organization, before the certification application was filed or while the certification application was pending before the Board, *the certification would still go forward*, and the transferee would be “plugged into” the process, by virtue of section 69 of the *Labour Relations Act*. The Board would then address any problems involving the identity of the employer or the bargaining unit perimeters, or the continuation of bargaining rights under section 69(6) of the Act, which reads as follows :

69. (6) Despite subsections (2) and (3), where a business was sold to person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the

businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

49. Under the *Labour Relations Act*, a transfer of all or part of a “business” would not derail a certification application, and questions of bargaining structure are sorted out under section 69(6).

BILL 136 - SOME GENERAL OBSERVATIONS

50. The *Labour Relations Act* is a general collective bargaining statute, with only a few provisions dealing with business reorganization. By contrast, restructuring is one of the central themes of Bill 136, which is entitled: “An Act to provide for the expeditious resolution of disputes during collective bargaining in certain sectors and to facilitate collective bargaining following restructuring in the public sector and to make certain amendments to the Employment Standards Act and the Pay Equity Act”. Section 1 of Bill 136 sets out these *purposes*:

1. The following are the purposes of this Act:

- 1. To encourage best practices that ensure the delivery of quality and effective public services that are affordable for taxpayers.
- 2. To facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations.
- 3. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances.
- 4. To foster the prompt resolution of workplace disputes arising from restructuring.

51. The background of Bill 136 is familiar to everyone: the merger of school boards and municipalities, the closure or reorganization of public hospitals, the restructuring of public utilities, and so on. Each of these organizational reforms has an impact on collective bargaining; and in view of the pace and volume of change, the Legislature has determined that new tools are needed to rationalize the collective-bargaining structure, and facilitate collective bargaining in the new setting. That is the purpose of Bill 136; and to accomplish that objective, the Board has been given new powers to merge or realign bargaining units and determine which trade union will represent employees in those more broadly-based units.

52. The focus of Bill 136 is on *institutional change*, and the consequent need to rationalize bargaining structures. But Bill 136 has not abandoned the notion of employee self-determination - either in its stated purposes or its substantive provisions. There is still a recognition that the trade union should be the “freely-designated representative of the employees”, and the statute makes extensive use

of representation votes so that employees will have an opportunity to participate in the selection of their bargaining agent.

53. In other words, while employee wishes may not bulk large in the determination of bargaining unit perimeters, they remain a significant factor to be taken into account in the selection of the bargaining agent - just as they are under the *Labour Relations Act*. Moreover, if the values and processes found in that Act can be squared with Bill 136, without serious friction, it seems to me that the Board should endeavour to do that. The fact that Bill 136 is paramount does not presuppose any particular inconsistency, nor preclude efforts at harmonization.

54. I will return to this consideration later.

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55. Bill 136 is triggered by what might be described as a “restructuring event” (usually some form of merger) involving the employer. It is that restructuring event that makes it necessary to redefine the bargaining structure, and may make it necessary to determine which trade union represents employees in the newly-defined bargaining unit(s). In most cases, the date of the restructuring event fixes the so-called “changeover date”, which Bill 136 uses as a kind of “before and after” benchmark, for a variety of statutory purposes.

56. The statute permits a new employer and the affected trade unions to *agree* on the number and description of the bargaining units. The affected parties can also *agree* on the identity of the union that will represent each bargaining unit. And, if there is complete agreement, there is no need for any Board involvement in this aspect of the restructuring process (sections 20 and 21). However, in the absence of such agreement, the Board has to resolve these issues, taking representation votes as necessary to determine which competing union will prevail. And if 40% of the employees in the new bargaining unit(s) were “non-union” before the restructuring event, there must be a non-union option on the ballot as well.

57. For present purposes, it is unnecessary to review the restructuring mechanism in any detail. It suffices to say that Bill 136 combines successorship notions familiar from the *Labour Relations Act*, with a greatly expanded authority - indeed imperative - to restructure bargaining units to suit the new institutional setting. Bill 136 envisages that the amalgamation or rationalization of public sector service providers (school boards, municipalities, hospitals, etc.) will be accompanied by a parallel process for consolidating bargaining units - using representation votes, as necessary, to allow employees to choose between competing unions. While this process is under way, bargaining rights are maintained in the “like unit” that existed before (section 14), the collective agreements continue to apply (section 15), and certain ongoing proceedings are terminated until the restructuring exercise is completed (section 18). Once the new bargaining units and bargaining agents are determined, the resulting employer and union parties are expected to renegotiate the amalgam of predecessor collective agreements (notionally “stapled together” and treated as one) which have been maintained in place up to that point (see sections 14 and 24).

58. In most cases, what sets the Bill 136 process in motion is some kind of merger of public sector organizations, that before that, were separate “employers” under the *Labour Relations Act*. However, I have used the term “restructuring event” in an earlier paragraph, because in the hospital sector, the Board’s restructuring powers can be engaged without any formal merger of the predecessor entities. Sections 8 and 9 of Bill 136 read this way:

8. (1) This Act applies upon the amalgamation of two or more hospital corporations during the transitional period.

(2) For the purposes of this Act, the corporations that are amalgamated are the predecessor employers and the corporation that exists when the amalgamation takes effect is the successor employer.

(3) For the purposes of this Act, the changeover date is the date on which the amalgamation takes effect.

(4) In this section,

“hospital corporation” means a corporation that operates a hospital.

9. (1) The Board may by order declare that this Act applies as a result of,

- (a) the merger of all or part of the operations or administration of two or more employers who operate hospitals during the transitional period; or
- (b) a substantial restructuring of two or more employers who operate hospitals during the transitional period.

(2) The order must specify which employers are the predecessor employers and which are the successor employers for the purposes of this Act.

(3) For the purposes of this Act, the changeover date is the date on which the order is made, or such other date during the transitional period as the order may specify. The order may specify a date earlier than the date on which it is made.

(4) An employer operating a hospital that may be the subject of an order or a bargaining agent that represents employees at such a hospital may request the Board to make the order.

(5) The Board shall not make an order under this section except pursuant to a request under subsection (4).

(6) When making an order under this section, the Board shall consider the following factors and such other matters as it considers relevant:

- 1. The scope of agreements under which services are shared by the participating hospitals.
- 2. The extent to which the participating hospitals have rationalized the provision of services.
- 3. The extent to which programs have been transferred among participating hospitals.
- 4. The extent of labour relations problems that have resulted or could result from the agreements, rationalizations or transfers.

(7) This section does not apply with respect to an employer that is a municipality or local board or the Crown.

59. Section 8 contemplates the same kind of mergers that have happened recently with school boards or municipalities (for example, the new City of Toronto). Section 8 envisages a *formal fusion of the predecessor corporations*. The date of the amalgamation establishes the “changeover date”.

60. Section 9 is a little different. Section 9 contemplates the *discretionary* application of the Act in what might be described as an “operational merger” - a situation where there has been a “rationalization of service delivery” between corporate entities that are not formally amalgamated. Section 9 extends the statute’s remedial reach to circumstances which do not fit a standard merger scenario, but nevertheless give rise to the kinds of problems to which Bill 136 is addressed.

61. Section 9(6) sets out some of the circumstances which the Board must consider in deciding whether to make an order under section 9(1). These items illustrate the kind of scenario which would not be caught by section 8, but to which Bill 136 might sensibly apply. However, in deciding whether section 9 “should be made to apply” (i.e. how the Board should exercise its discretion under section 9(1)), it seems to me that the Board should also take into account the general scheme and purposes of Bill 136, read as a whole. Those purposes are recorded in section 1 of Bill 136, that has been reproduced above.

*

62. What is missing from this overview - but also from Bill 136 itself - are any clear rules about how the restructuring processes governed by Bill 136, “can” or “should” be squared with the acquisition of bargaining rights by certification under the *Labour Relations Act*. Section 18 of Bill 136 terminates certain outstanding proceedings following the occurrence of a restructuring event, but outstanding certification proceedings are not among those mentioned in section 18. Section 18 does not address new certification or termination applications at all - which suggests (at least implicitly) that the Legislature did not intend any automatic suspension of such matters.

63. Similarly, section 39 of Bill 136 provides a statutory override in the event of any operating incompatibility between Bill 136 and any other statute. In the event of a collision, Bill 136 prevails. But there is no suggestion that a new certification application *automatically* generates that kind of conflict. In fact, section 15(4) of Bill 136 contains these words:

“If ... after the changeover date a bargaining agent is certified or voluntarily recognized as the bargaining agent for a bargaining unit of the successor employer but there has never been a collective agreement between the bargaining agent and the successor employer, the following rules apply ...”.

That language specifically contemplates that there may be a successful certification application after the “changeover date”, (i.e. the date on which the merger or other restructuring event occurs). These words would be unnecessary if the merger (etc.), automatically prevented a certification or termination application from being made or from being continued.

64. The only provision of Bill 136 that *expressly* restricts certification applications is section 28, which reads as follows:

28. (1) Subsections (2) and (3) apply if an order under section 22 is requested.

(2) During the period beginning 10 days after the order is requested and ending when the order is made, no person may apply for certification of a bargaining agent to represent employees of the successor employer who are not members of a bargaining unit when the order is requested.

(3) During the period beginning when the order is requested and ending when the first collective agreement between the parties comes into operation after a collective agreement continued under subsection 24(2) or a composite agreement expires, no person may apply,

- (a) for a declaration that the trade union no longer represents the employees in the bargaining unit; or
- (b) for the certification of a different bargaining agent to represent the employees in the bargaining unit.

Thereafter, the right of a person to make the application is determined under the Act that otherwise governs collective bargaining in respect of the employees.

(4) Subsection (3) applies with necessary modifications if an agreement under section 20 is in effect and, for that purpose, the applicable period begins when the agreement comes into effect.

65. Section 28(2) contemplates that non-union employees may make a certification application *despite* an application to the Board to restructure bargaining units under Bill 136. Indeed, the section gives non-union employees *an additional 10 days after the order is requested to make their application*. In other words, not only is there no incongruity between an outstanding certification application and an outstanding restructuring request, but the Legislature has given non-union employees an extra window of opportunity to make such certification application, *despite a Bill 136 request*. The statute clearly contemplates that the two can proceed together - or, at least, that the certification application can go forward without any necessary conflict with Bill 136.

66. Against that background, it is difficult to see why employees should be in a substantially different position if they want to *change* bargaining agents. There is no obvious policy reason why this should be so - particularly when changing unions would not normally have any effect on bargaining unit structure. For as I have already noted, the Board's normal policy in such matters is that a raiding union is required to "take" the unit as it finds it, so that a "raid" has no impact on the bargaining structure at all. All that happens is that one union is substituted for another, in accordance with the wishes of the employees in the bargaining unit.

67. To trigger a section 28(3) bar, there must be a restructuring request to the Board under section 22 - in which case the bar begins to operate *when the request is made*. The section 28(3) bar has no retroactive effect on certification applications already in process. Thus, if the certification application is made *prior* to the application of Bill 136, or to a request made under Bill 136, section 28(3) raises no obstacle.

68. To trigger a section 28(4) bar, the parties must have an agreement on the bargaining unit configuration properly entered into under section 20 - in which case the bar begins to operate when that agreement comes into effect. Again, there is no retroactive effect; moreover, the agreement must be one that otherwise meets the statutory requirements.

69. I shall have more to say later about each of these provisions - and, in particular, about the express restrictions on certification found in section 28. For the moment, I simply observe that a restructuring event (for example, a merger) does not automatically raise a bar to a certification application by non-union employees, or to an effort by employees to oust one trade union and replace it by another.

70. So, in summary, unless the circumstances of this case engage section 8 or 9 of Bill 136, Bill 136 has no application at all, and the situation falls to be determined under the general provisions of the *Labour Relations Act*. However, even if Bill 136 can be said to apply, it is not at all clear that a certification application is barred; and it is certainly not barred automatically upon the occurrence of the restructuring event. Finally, in exercising its *discretion* under section 9, I think that it is sensible for the Board to ask whether there is a good labour relations purpose for making the Act apply at the time and in the circumstances under review - which is to say, *a purpose rooted in the restructuring imperatives of Bill 136*. Because if there is no obvious Bill 136 purpose to be served, it may make sense to let matters work themselves out under the *Labour Relations Act*, reserving the parties' rights to make a later application under Bill 136 if a restructuring problem actually does arise. The fact that Bill 136 may not apply *now*, or in the manner suggested by the SEIU, does not mean that it cannot apply *later*, or to address concrete restructuring issues.

71. With these observations, then, I will examine the "bar question" in a little more detail.

DOES (OR SHOULD) BILL 136 APPLY IN THIS CASE, AND IF BILL 136 DOES APPLY, WOULD THERE BE A “BAR” TO THE CHCW’S CERTIFICATION APPLICATION?

72. On the basis of the material before me, I am not persuaded that there has been an “amalgamation of two or more hospital corporations *during the transition period*”, within the meaning of section 8 of Bill 136. There may have been a transfer of certain functions or assets from the WCA to St. Joseph’s. But I do not think that the two corporations have been “amalgamated”. Each of them maintains its separate existence and continues to deliver services to the public in accordance with its own mandate. The two organizations have not become one.

73. Moreover, the interaction between the WCA and St. Joseph’s in furtherance of the Parkwood transfer cannot be construed as an “amalgamation” *during the transition period* - or at least *during the transition period*, and *prior* to the CHCW’s certification application.

74. The transition period is defined in section 2 of Bill 136. It begins on October 29, 1997 when Bill 136 was proclaimed, and runs until December 31, 2001. Nothing happened after October 29, 1997 but before the filing of the CHCW’s certification application on November 21, which could be construed as an “amalgamation” - which is what would be necessary in order to engage section 8 and fix a “changeover date” before the certification application was filed.

75. It is true that certain directors from the WCA crossed over to St. Joseph’s in September 1997. But I do not think that amounts to an “amalgamation” of two or more hospital corporations; and in any event, that change occurred in September 1997 - *prior* to the proclamation of Bill 136, and therefore *prior* to the beginning of the “transition period” defined in section 2. It did not happen *during* the transition period.

76. Accordingly, I do not think that section 8 has any application to the issues raised in this case; for even if it were applicable as of December 1, 1997 (i.e. if the transfer of assets were somehow said to effect the “amalgamation” of the hospital corporations), that would not generate a changeover date *prior* to the CHCW’s certification application on November 21, 1997.

77. Does section 9 apply? Or, more accurately, since the Board has a discretion under section 9(1), “*should*” section 9 be made to apply? And if section 9 *could* apply, *should* the Board *also* exercise its discretion under section 9(3) to set a “changeover date” prior to November 21, 1997 - which is to say, in a manner that might raise a potential timeliness issue for the CHCW’s certification application?

78. That is what the SEIU urges the Board to do. The SEIU argues that the Board should “back-date” the “changeover date” to a point prior to the filing of the SEIU’s Bill 136 application, in order to set up a *potential* timeliness problem for the CHCW’s certification application. The SEIU argues that it is necessary to do that, so that a change in bargaining agents for the employees of Parkwood, will not inhibit the restructuring process in which Parkwood is engaged. (I say “*potential*” timeliness problem, because it is not so clear that this would necessarily raise a bar. As I have already noted, the statute seems to contemplate that, in at least some circumstances, a certification application can proceed even after the “restructuring event” which fixes the “changeover date” - again, see section 15(4) of Bill 136.)

79. However, there are several problems with the SEIU’s proposition.

80. First of all, I can think of no good policy reason (i.e. a reason rooted in the purposes of Bill 136) for the Board to exercise its discretion in this way. Why should the Board back-date the changeover date to some artificial point after October 29, 1997, but before November 21, 1997, when the CHCW’s certification application was filed? Why choose a date other than November 30 or December 1, 1997 - the date that the Hospital Restructuring Committee specified for the final transfer of assets and funding

to St. Joseph's? That is the date that was prescribed by the Hospital Restructuring Commission, and that is the date to which the WCA and St. Joseph's were working to complete the transfer. Why choose an earlier date - particularly when doing so might inhibit the exercise of employee rights?

81. In this regard, it is interesting to note a October/November communication from Parkwood to its employees, which includes this update:

The Women's Christian Association announced a further delay October 31 in the transfer of Parkwood Hospital to St. Joseph's Health Centre. The delay is the result of outstanding matters still to be resolved around the issue of compensation to be paid to the WCA for its assets.

The Ministry of Health again asked the Health Services Restructuring Commission for an extension of the transfer date to November 30, 1997. The Commission granted the Ministry's request.

Similarly, a December 1997 communication to employees (and others) from the President and CEO of Parkwood begins:

On November 30, 1997 Parkwood Hospital will join the St. Joseph's Health Centre family, combining the rich history of two organizations with a strong tradition of caring in London. Through its new representation on the board of directors of the St. Joseph's Health Centre, the Women's Christian Association will continue to have a voice and care of Parkwood, and to extend beyond Parkwood, its particular expertise in caring for the elderly, the disabled and the dying.

82. The expectation of the parties - communicated to employees - is that the transfer date would be November 30, 1997. Why should the Board pick any other "changeover date" under section 9(3)?

83. If section 9 applies at all, there is a strong case to be made for fixing the changeover date as at December 1, 1997 - the point at which St. Joseph's had acquired the assets and funding for Parkwood. But in my view, there is no case at all for choosing a changeover date *after October 29, 1997* but prior to *November 21, 1997*, which might set up a barrier to the employees choosing whether they wish to be represented by the SEIU or the CHCW.

84. Both Bill 7 and Bill 136 recognize the importance of the trade union being "the freely-designated representative of employees"; and I do not think that this value should be discounted or overridden, unless to do otherwise would frustrate the processes or purposes set out in Bill 136. And here it would not. If the CHCW is successful, it will simply stand in the shoes of the SEIU, representing the bargaining units at Parkwood that were formerly represented by the SEIU. These bargaining units will remain part of the mix in any future restructuring exercise, just as they would if the SEIU were to remain the employees' bargaining agent.

85. To reiterate: a successful certification application merely substitutes the CHCW for the SEIU in respect of the established bargaining units at Parkwood now represented by the SEIU - which is to say, merely adds a new bargaining agent to the scene as the representative of employees. It does not change the existing bargaining structure, and does not prevent a restructuring from going forward, just as before, with whatever resort to Bill 136 seems necessary. Furthermore, the CHCW has already agreed to be bound by any understandings respecting the bargaining structure formerly concluded with the SEIU. A successful certification application by the CHCW will not change those understandings at all.

86. Accordingly, the fundamental problem with the discretionary application of Bill 136 (i.e. pursuant to section 9(1)) is that, at this point, there is simply no reason for it. The situation does not display the "mischief" which Bill 136 was designed to remedy. Assuming for the moment that the "rationalization" of hospital services is (or was as of November 21, 1997) sufficiently far advanced to fit within section 9(6) [the SEIU says it was, the CHCW says it was not], the material simply does not

demonstrate any “restructuring problem” at all at this point. The SEIU had agreed with St. Joseph’s - albeit informally (see below) - to preserve the existing bargaining unit pattern at Parkwood, as Parkwood was added to the constellation of institutions run by St. Joseph’s, and the results of the certification application will not change that.

87. Whether this bargaining unit pattern should remain in the long run, is perhaps an open question. But there was no resort to Bill 136 necessary or contemplated at any time prior to the certification application, nor does the certification application, in itself, change the bargaining unit perimeters at Parkwood or St. Joseph’s. All that will happen is that Parkwood will “join the St. Joseph’s Health Centre Family” [to use the phrase from the President’s communique] bringing with it two bargaining units represented by the CHCW rather than two bargaining units represented by the SEIU.

88. There is, therefore, no good reason to apply section 9(1) (and thus Bill 136) at this time, and even less reason to “back-date” the “changeover date”, so as to raise a potential barrier to the exercise of employee rights.

89. Counsel for St. Joseph’s expressed concern that if a “new player” is added to the collective bargaining mix, it may be more difficult to achieve the kind of overall agreement which would minimize litigation, and facilitate the integration of Parkwood into the St. Joseph’s organization. Counsel notes - correctly I think - that there is no love lost between the CHCW and the SEIU; and that the SEIU remains the dominant force in the St. Joseph’s organization. Counsel suggests that one can reasonably anticipate some friction between these two union rivals, who may use the tactical tools available to them to advance their own position, to the detriment of the orderly absorption of Parkwood. That, after all, is what the SEIU is seeking to do with its Bill 136 application and its novel request to back-date the changeover date so as to derail the CHCW’s certification application.

90. I do not minimize this very practical concern. However, there are several answers to it.

91. First of all, as I have already noted, the CHCW’s certification application will not disturb the pre-existing bargaining structure, which the SEIU and St. Joseph’s were content to live with; moreover, the CHCW is not seeking to repudiate any settled understandings that St. Joseph’s had with the SEIU. On the contrary. The CHCW is prepared to abide by the SEIU’s agreement to maintain the bargaining unit status quo. There is no current dispute between the parties over the “rationalization” of the bargaining structure.

92. Secondly, if there is a failure to agree on one point or another, Bill 136 provides ample tools to address that situation. If there is a deadlock - or even serious friction - it is open to an interested party to apply to the Board under Bill 136 for an appropriate interim or final order.

93. Finally, I doubt that counsel’s proposed solution - keeping the SEIU in place, perhaps for years - is a recipe for harmony. That solution entails locking employees into a bargaining agency relationship that they may not want; and I doubt that that will facilitate Parkwood’s smooth absorption into the St. Joseph’s organization. For the fact is: employees at Parkwood have already voted for or against the SEIU, and I doubt that orderly labour relations will be furthered by a formula which discounts their wishes and destroys their ballots.

94. So in all the circumstances, I do not think that this is an appropriate case for the Board to exercise its discretion under section 9(1) to make Bill 136 apply in the way suggested by the SEIU.

95. It is also worth noting (as the parties did in the course of argument), that the application of Bill 136 may have quite unintended consequences. For example: in October 1997 (i.e. prior to the proclamation of Bill 136) St. Joseph’s received an arbitration Award which it has implemented, but

which has not yet been transformed into a formal collective agreement. The parties did this in good faith and for sound labour relations reasons. Yet the status of that Award is somewhat ambiguous if Bill 136 is made to apply.

96. No one has any appetite to resile from this Award, which results from an arbitration proceeding that was *not* aborted by section 18(5) of Bill 136, and which replaces the terms of a collective agreement that expired in 1995. The employees affected by that Award have been expecting a revision of their conditions of employment for three years, and no one sees any purpose in shattering those expectations. However, the fixing of a “changeover date” for the purposes of Bill 136 restructuring, may also have the effect, as a matter of law, of resurrecting the old, long-expired collective agreement, for the purposes of Bill 136 (but perhaps not for other legislative purposes - see section 15(2) of Bill 136). This poses a legal and practical conundrum of uncertain proportions in circumstances where, I repeat, there is really no “Bill 136 problem” at all - at least not yet.

97. In my view, therefore, there is no good reason for fixing a “changeover date” and engaging in the Bill 136 exercise at this stage, there are good reasons for not doing so, and there are no reasons at all for fixing a changeover date before the significant restructuring event that occurred on November 30, 1997.

* * *

98. However, suppose that Bill 136 were made to apply, either because the Board exercised its discretion under section 9(1) of Bill 136, or because the Board was able to pinpoint an “amalgamation of two or more hospital corporations” occurring during the transition period (i.e. between October 29, 1997 and December 31, 2001). In either event, it seems to me that the changeover date (flowing from statute or selected the Board) would, on the material before me, be November 30/December 1, 1977 - the actual transfer date, the date towards which St. Joseph’s and the WCA have been working for many months, and the date that they announced to the employees of the two institutions. What effect would that have on the processing of the CHCW’s certification application?

99. This scenario raises the application of section 28 of Bill 136 - which is entitled “Restriction on certification applications” and is the only provision which deals expressly with a potential bar to an otherwise timely certification application.

100. It is common ground that section 28(2) can have no application, because it applies only to “non-union employees” - i.e. employees of a successor employer who are *not* members of a bargaining unit as of November 25, 1997, when the SEIU filed its Bill 136 application. Leaving aside, for now, whether St. Joseph’s can be described as a “successor employer” under Bill 136 as of November 25, 1997 (which entails a finding that either section 8 or section 9 apply to make it so) it is evident that the employees of Parkwood are currently members of a bargaining unit represented by SEIU, so that section 28(2) cannot apply.

101. Section 28(3) or (4) *might* apply “if an order under section 22 is requested” - as it was on November 25. But under section 28(3) that bar begins “when the [Bill 136] order is requested” - which is *November 25, 1997*. Here, the CHCW’s application for certification was launched on *November 21, 1997*, *before* the order was requested, and thus before the 28(3) bar is triggered. Accordingly, I do not think that section 28(3) creates any obstacle.

102. Section 28(4) is a little more complicated, because it refers back to section 20, which has its own legal intricacies.

103. Section 20 of Bill 136 describes the process by which institutional parties (or some of them) may agree on a new bargaining unit configuration in the new organizational setting. Once again, it requires that there to be a “successor employer” under Bill 136, which means that Bill 136 must apply or be made to apply under section 9(1). However, quite apart from that, such agreement can only be concluded “on or after the changeover date” - which, in the instant case (either on a reading of the statute or through the exercise of the Board’s discretion) would not be before December 1, 1997 at the earliest. Any understanding or agreement prior to the changeover date is of no force and effect; or, to put it more accurately, does not fit within section 20(1), unless formally confirmed “on or after the changeover date”.

104. What Bill 136 contemplates is that *after the beginning of the transition period on October 29, 1997*, and *after the “changeover date”* triggered by the restructuring event, the parties will sit down and try to work out the appropriate bargaining structure in the new institutional setting. The informal understanding in this case to “preserve the status quo” does not meet those requirements.

105. In addition, pursuant to section 20(7) of Bill 136, “an agreement does not come into effect until it is *executed* by the employer and every bargaining agent that is a party to the agreement”. In my view, that means that there must be a formal document “*executed*” by the parties. It is not enough that there is some informal understanding that the bargaining unit status quo will be maintained, as the restructuring process unfolds. The parties are obliged to formalize and sign their agreement.

106. I am reinforced in that view by the parallel language of section 21(2), concerning the companion agreement respecting the identity of the bargaining agent. That agreement, too, must be formally executed, with a *copy* for the successor employer.

107. It seems to me therefore that what the statute requires is an instrument in writing that is “executed” by the parties. And there is no such document in this case. All that we have here is an informal understanding that the bargaining pattern will remain in place for now. That is something that may well be sensible and is quite understandable when all of the units are represented by the SEIU. However, it is not the kind of “agreement” contemplated by Bill 136 (and necessary to raise a section 28(4) bar).

108. The SEIU submits that the word “executed” is elastic enough so as to encompass an unwritten understanding upon which the parties are acting. Counsel notes that pursuant to section 20(8), an agreement under section 20(4) to maintain the status quo can be in effect, even though there is no related agreement under section 21 or related Board order under section 23. In this respect, he says, the kind of status quo agreement contemplated by section 20(4) need not meet the same requirements as the broader multi-party agreements on the bargaining unit contemplated by sections 20(1) or 20(2).

109. *However, in my view, the use of the term “executed” in section 20(7) contemplates a formal document, not some informal, unwritten understanding.* Nor is this a purposeless formality. Under Bill 136 a “section 20 agreement” *binds the Board and affects both employee and third-party rights*; and in that context, I do not think it is inappropriate to look for a written instrument. On the contrary. Policy considerations support the inference that, in my view, already flows from the way in which section 20(7) is framed. The scheme of the Act (for example, the application of section 28(4)) requires a clearly defined and indisputable starting point, so that everyone will know where they stand. A “20(4) agreement” has to be reduced to writing and executed by the parties.

110. In the instant case, there is no agreement executed between the SEIU and an employer defining the bargaining unit structure which will prevail for Parkwood and St. Joseph’s if a restructuring event were found to have occurred. Accordingly, for this reason, too, (and even if Bill 136 applies) I do

not think that section 28(4) stands in the way of the certification application filed by the CHCW on November 21, 1997.

THE NEXT STEP TO BE TAKEN IN PROCESSING THE CERTIFICATION APPLICATION.

111. *For the foregoing reasons, I am satisfied that however one approaches the interplay between the Labour Relations Act and the various provisions of Bill 136, the CHCW's certification application should proceed.*

112. In my view, there are neither legal nor policy reasons for derailing that application and denying employees the opportunity to change their bargaining agent if that is their wish; moreover, this is so however one considers the various options under Bill 136, or whether the matter simply proceeds under the Labour Relations Act (leaving any real restructuring issues that surface, to be sorted out later)

113. That said, having heard the parties' representations, I am also satisfied that the employees at McCormick and Parkwood should be treated separately for "appropriate bargaining unit purposes" under section 9 of the *Labour Relations Act*. Whatever may have been the case before, events have separated the interests of the employees in each of these institutions, so that it is appropriate for them to be treated as separate bargaining units, and have their ballots counted separately.

114. To this extent, the Board's normal approach to bargaining unit determination under section 9 of the *Labour Relations Act* should be modified, to take into account the new labour relations reality, where the McCormick Home and its employees will continue with the WCA and under the *Labour Relations Act* alone, while Parkwood will find its way into the St. Joseph's organization, and Bill 136 may apply. The transfer - actual or imminent - requires that McCormick and Parkwood be treated separately. McCormick and Parkwood employees should be in two different bargaining units (which may be the result of a "successorship" anyway).

115. With this in mind, the Board directs that the ballots be counted in a voting constituency comprising all service employees working for the WCA *at the McCormick Home* for the Aged.

116. The Board further directs that the ballots be counted for the two groupings of employees at *Parkwood* who are currently represented by the SEIU (i.e. the RPNs; and the rest of the service employees, excluding RPNs).

117. For the moment, it is sufficient to count the ballots. It is unnecessary to finalize the bargaining unit descriptions at Parkwood, nor consider whether St. Joseph's is *now* a "successor employer" under section 69 of the *Labour Relations Act*, or under one or other provisions of Bill 136 (whatever may have been the case prior to December 1, 1997). The precise identity of the employer can be sorted out later if there is any disagreement about that.

118. If the raiding union is successful in one or other of the groupings described above, the certification application can proceed, and any outstanding issues can be resolved. Alternatively, if the SEIU is successful in one or more of those groupings, the certification application can be dismissed insofar as it applies to that grouping, and a one-year bar will be imposed pursuant to section 10 of the *Labour Relations Act*.

119. The matter is remitted to the Manager of Field Services so that the ballots can be counted.

120. Such count must occur forthwith.

121. I will remain seized in the event that the parties are unable to resolve any outstanding issues, in accordance with the observations set out above.

COURT PROCEEDINGS

0062-95-G to 0069-95-G; 4684-94-G to 4710-94-G (Court File No. D180/98) D.R. Thomas Electric, et al., Applicants v. International Brotherhood of Electrical Workers, Local 402, Respondent

Construction Industry - Construction Industry Grievance - Judicial Review - Board finding that employers had failed to make contributions to health and insurance plan as required under collective agreement - Board concluding that by withholding retail sales tax, employers caused contributions to be less than amount required under collective agreement - Board allowing grievances and awarding damages - Employers seeking judicial review of Board's decision - Divisional Court dismissing motion brought by union to strike certain affidavit material from employers' application record

Board decision not reported.

Ontario Court (General Division) Divisional Court, McCartney J., May 13, 1998.

McCartney J.: This is a motion by the Respondent to strike out certain paragraphs and exhibits in an affidavit filed by the Applicants in support of an application for judicial review of a decision of Ontario Labour Relations Board, dated August 13, 1997. It also seeks to strike paragraphs in the applicant's factum relating to the alleged offending parts of the affidavit. The affidavit is that of one Murray Fraser, and was sworn January 20 1998. The application is scheduled to be heard in Thunder Bay on June 15, 1998.

The moving party contends that I have jurisdiction to hear this motion on the basis of Rule 37.02(1) of the Rules of Civil Procedure, and Section 21(3) of the *Courts of Justice Act* as a Judge of the Divisional Court. The Divisional Court being a branch of the General Division, even though these sittings are set up to hear motions relating to General Division matters, hearing no objection from the responding party, I agreed to do so.

The moving party contends that an affidavit which augments the evidence before an administrative tribunal on an application for Judicial Review is only admissible where, (a) the administrative tribunal has made a determination on an essential point without any evidentiary basis or, (b) the administrative tribunal has breached the rules of natural justice.

Since the applicant has not alleged either (a) or (b) in its application, the affidavit of Murray Fraser, for the most part, should be stricken. In support of this proposition, he cites several well known cases, two of which are as follows, *Re Keeprite Workers' Independent Union et al*, and *Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) @p. 32 and *Re Securicor Investigations & Security Ltd. and Ontario Labour Relations Board et al.* (1985) 18 D.L.R. (4th) @p. 151.

Counsel for the applicant disagrees. He points out that one of the main points of the application is that the Board exceeded its jurisdiction in making the award that it did. In any event, he argues that the affidavit in question is not about augmenting the evidence in the sense of providing new evidence, but

rather about getting the proper “record” before the Court. Section 10 of the *Judicial Review Procedure Act* requires the Ontario Labour Relations Board, in this instance, to file “the record of the proceedings in which the decision was made”. Missing from this record, he says, is the original submissions of the parties, which were a part of the evidence before the Board. In support of this allegation, he quotes from page four of the Board’s decision of August 13, 1997, as follows:

“The parties agreed to have the Board deal with these grievances without holding a hearing — the parties further agreed that the Board rely on *their written submissions* and the following agreed Statement of Facts....”

All that the Fraser affidavit does, argues counsel, is to bring certain “exhibits” and positions of the applicant before the Court which should have been a part of the record submitted by the Ontario Labour Relations Board but were not, or may not have been, because of the omission of the original written submissions of the parties.

In analyzing the Fraser affidavit, I am satisfied that there is nothing there which cannot be found in the Agreed Statement of Facts or the original Submission of the Applicant. Consequently, it should be admitted in its entirety. As was said in the *Securicor* case at p. 572.

“While that decision (the *Keeprite* decision) which was before the Divisional Court in *Re O.P.S.E.U.*, decided that affidavit evidence is admissible, the principle to be extracted in the Court of Appeal decision, which canvassed the authorities, is that affidavit evidence as to what evidence was given before an arbitrator is admissible to augment the record on an application for judicial review of a arbitration award...”

The use to which the affidavit may be put can be decided by the Divisional Court at the appropriate time.

The motion is therefore denied.

If the parties cannot agree that costs should follow the result they may speak to me within the next ten days.

0062-95-G to 0069-95-G; 4684-94-G to 4710-94-G (Court File No. D180/98) D.R. Thomas Electric, et al., Applicants v. International Brotherhood of Electrical Workers, Local 402, Respondent

Construction Industry - Construction Industry Grievance - Judicial Review - Board finding that employers had failed to make contributions to health and insurance plan as required under collective agreement - Board concluding that by withholding retail sales tax, employers caused contributions to be less than amount required under collective agreement - Board allowing grievances and awarding damages - Employers’ application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court (General Division) Divisional Court, Smith ACJO, Pringle and Haines JJ., June 17, 1998.

The Court (endorsement): In our view the Ontario Labour Relations Board acted within its exclusive jurisdiction pursuant to section 114 of the *Labour Relations Act*, 1995 S.O. 1995 Chap. 1 when it

interpreted and applied the relevant provisions of the *Retail Sales Tax Act*, R.S.O. 1990 c. R.31, as amended, in its adjudication of the grievances referred to it by the respondent under section 133 of the *Labour Relations Act*. As the Board was acting within its jurisdiction the appropriate standard of curial review is one of patent unreasonableness.

We find that the reasoning of the Board is consistent with the Board's ruling in *Tesc Contracting* [1995], O.L.R.B. Rep. July 1018 and the developing line of authorities relating to multi-employer benefits plans. In our opinion it cannot be said that the decision reached in this case is patently unreasonable. Indeed, in our view, the decision is correct.

The application is, therefore, dismissed with costs to the Respondent fixed at \$2500.00.

4302-94-U (Court File No. 1130/96) Guillaume Kibale, Applicant v. University of Ottawa and the Association of Part-Time Professors of the University of Ottawa, Respondents

Duty of Fair Representation - Judicial Review - Natural Justice - Reconsideration - Unfair Labour Practice - Applicant alleging that union breached its duty of fair representation by failing to arbitrate grievance regarding job competition - Application dismissed - Reconsideration application alleging that vice-chair acted in bad faith and denied applicant natural justice dismissed - Application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court of Justice (Divisional Court), Forget, Sedgwick and Manton JJ., May 8, 1998.

Forget J.: [Translation] This is an application for judicial review under subsection 6(1) of the Judicial Review Procedure Act R.S.O. 1990, J-1.

The Applicant is appealing a decision by the Ontario Labour Relations Board on the grounds that the said Board made an error in interpreting sections 49, 69, and 91(7) of the Labour Relations Act and is also claiming violation of his rights according to the principles of natural justice, as guaranteed by the Canadian Charter of Rights and Freedoms. He has included in his application his former employer, the University of Ottawa, and the Association of Part-time Professors of the University of Ottawa (APTPUO).

All of the Respondents contest the application on the grounds that the decision of the Board was accurately based on the applicable criteria, and they indicate that the jurisdiction of this court is very limited, where the points at issue are concerned.

The facts that gave rise to this dispute are not seriously in question. Rather, this application is about the interpretation of these facts.

In the fall of 1990, the Applicant taught Course ECO-2515 in the Department of Economics of the Faculty of Social Sciences at the University of Ottawa. Several complaints were made by students about the Applicant's competency to teach this subject. The Dean conducted an investigation and concluded that the Applicant had not met the standards of the Department or the Faculty: the professor's evaluation was unsatisfactory. Based on these findings and pursuant to the collective agreement between the APTPUO and the University, the Dean imposed disciplinary measures consisting of cancellation of Professor Kibale's contract and suspension from any teaching position for a period of 24 months.

On February 27, 1991, the APTPUO contested the disciplinary measures against the Applicant. Following three days of hearings, an agreement was reached between the APTPUO and the University of Ottawa, ending the grievance. According to the September 15, 1993 agreement, the Applicant received the sum of \$2,000 and kept the seniority that he had accrued up to the month of December 1990. The parties agreed to a 12-month suspension commencing January 1, 1991. Articles 6.9 through 6.13 of the collective agreement in force at the time, which dealt with discipline and dismissal, were written into the agreement between the APTPUO and the University of Ottawa.

During the fall of 1995, the Applicant applied for a position in the same Department and was turned down. The Applicant then asked the APTPUO to file a grievance, but the grievance committee refused to do so.

Following the APTPUO's decision, the Applicant filed an application with the Ontario Labour Relations Board alleging that the APTPUO and the University had violated sections 49, 49.1, 69, 70, and 91(7) of the Labour Relations Act. A three-day hearing was held before Bram Herlich, Vice-Chair of the Board. On October 30, 1995, the Board dismissed the application on the grounds that the APTPUO had acted properly and fairly. Following an application by the Applicant for reconsideration of the decision, Mr. Herlich reconsidered the case and, on April 18, 1996, upheld his original decision.

The Applicant alleges that the Ontario Labour Relations Board exceeded its jurisdiction when it made an error in interpreting the provisions conferring jurisdiction on it. The Applicant claims that section 69 of the Labour Relations Act was violated, i.e., that the APTPUO representative was not impartial, but he does not provide any evidence to support this claim. The Applicant claims that the Board failed in its duty to be impartial in making a decision with respect to the APTPUO. He claims that the Board could not render a proper and impartial judgment concerning his application.

The University of Ottawa, Respondent, claims that the Board has jurisdiction to rule on any question of law or fact under section 114 of Labour Relations Act (1995) c.1 - Schedule A. The University claims that the Board did indeed have jurisdiction to rule on the issue before it. The University claims that the Board's decision can only be subject to judicial review if it is patently unreasonable or if the Board has made an error in interpreting the provisions of the legislation. The University claims that the only issue before the Board was whether or not the APTPUO acted impartially as a representative under section 59 of the Act. The University is of the opinion that there was no such violation by the APTPUO and that the Board therefore acted properly.

The APTPUO, Respondent, claims that it had the discretion not to pursue the Applicant's grievance, under Article 4.4 of the collective agreement, and that the only issue for consideration by the Board was whether or not the APTPUO acted as an impartial representative. It claims that the Board answered this question of fact, basing its decision on the APTPUO's actions and the objective criteria and observations available to the Applicant (level of seniority, qualifications, experience, etc.). The Association notes that the Board Vice-Chair applied the principles determining impartial representation expressed by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509.

The Ontario Labour Relations Board, Respondent, submits that the test for judicial review applicable in this instance according to the criteria found in the jurisprudence (*British Columbia Telephone Co v. Shaw Cable Systems Ltd.*, [1995] 2 S.C.R. 739 and *Canada v. Wiseman* [1995], 95 F.T.R. 200) is as follows:

- a) the existence of a statutory right of appeal;
- b) the existence of a privative clause;
- c) the area of expertise of the tribunal; and

- d) the nature of the issue and whether it is within the tribunal's expertise.

The Board also argues, as did the University of Ottawa, Respondent, that according to the Labour Relations Act, it has exclusive decision-making jurisdiction and is only subject to review if its decision is patently unreasonable or if it has made an error in interpreting the provisions. In order for this to obtain, the Board argues, there must be a lack of evidence to support the decision (cf. *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.* [1993] 2 S.C.R. 316.) The Board also argues that the courts tend to acknowledge the special expertise of the Ontario Labour Relations Board, and must exercise curial deference (cf., *Re City of Niagara Falls and CUPE Local 133 et al* (1992), 98 D.L.R. (4th) 110 (Ont. Div. Ct.).

The jurisprudence consistently indicates that the courts will only review the decisions of an administrative tribunal if it has made an error in interpreting the provisions conferring jurisdiction on it or if it has exceeded its jurisdiction by making an error of law in the performance of its function.

We have read and re-read the original decision of the Vice-Chair of the Board, dated October 30, 1995, and the decision dated April 18, 1996 dealing with the reconsideration of his original decision, pursuant to section 114(1) of the Labour Relations Act. We were unable to find any error in interpretation or overstepping of jurisdiction. Indeed, the decision is completely reasonable, given the evidence that the administrative tribunal had to consider.

In *Caimaw v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, La Forest J. stated on pages 1003 and 1004:

Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.

In *Canada (A.G.) v. PSAC* [1993] 1 R.C.S. 941, Cory J. stated on pages 963 and 964 that a patently unreasonable decision was synonymous with a clearly irrational decision. He stated:

In the *Shorter Oxford English Dictionary* "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational.... Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

[...]

It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

In *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Limited*, [1993] 2 S.C.R. 316, page 340, and in *W.W. Lester (1978) Ltd. v. U.A. Local 740* (1990), 76 D.L.R. (4th) 389, pages 418 and 419, the Supreme Court of Canada stated that a decision based on conclusions of fact can only be described as patently unreasonable if there is no evidence to support it. Indeed, in *Bradco Construction*, the Court stated that a decision is not subject to judicial review if there is any evidence to support it. In the case before us, there are several pieces of evidence to support the Board's decision.

The investigation of the application concerning the union's obligation to be impartial is, in our view, within the Board's exclusion jurisdiction. Indeed, on page 591 of *Health Sciences Association v. Versa Services* (1992), 91 D.L.R. (4th) 582, the British Columbia Court of Appeal stated that this type of question fell within the Board's area of expertise, jurisdiction, and experience. It follows that the Board,

in finding that the union had fulfilled its obligation to act impartially in its role as representative, in accordance with the statutory provisions, correctly interpreted the terms and conditions of the provisions conferring jurisdiction on it.

In *Plaza Fibreglass* (1993), 93 C.C.L.C. 14, 209, this Court noted that the role of the tribunal is narrowly defined, particularly where conclusions of fact are concerned. The question of sufficient evidence may only be subject to judicial review if there is a lack of evidence on an essential question. We agree that the Board took ample evidence into consideration in reaching its conclusions.

We should add that we paid no heed to the frivolous and vexatious allegations concerning the conduct and integrity of the Vice-Chair of the Board, since not a shred of evidence was produced to support them. The Vice-Chair of the Board conducted the proceedings with dignity and respect, observing the rules of natural justice and basing his findings strictly on admissible evidence.

On these grounds, the application for judicial review is dismissed. Costs are awarded to the University of Ottawa and the Association of Part-time Professors of the University of Ottawa, Respondents, and are set by the court at \$1,000 for each Respondent, payable immediately by the Applicant. The Ontario Labour Relations Board, Respondent, did not ask for costs and no costs are awarded to it.

[Copies de ce document (qui était en français à l'origine) sont disponibles du Bureau des avocats du Commission]

4604-97-PS;4605-97-PS (Court File No.348/98) Communications, Energy and Paperworkers Union of Canada, Applicant v. Ontario Labour Relations Board, **Toronto District School Board**, Office and Professional Employees International Union, Local 102, Canadian Union of Public Employees, Local 4400, Respondents

Bargaining Unit - Judicial Review - Natural Justice - Public Sector Labour Relations Transition Act - Reconsideration - Representation Vote - Board determining that five bargaining units appropriate for successor District School Board's operations and directing that representation votes be held - Board ruling that certain continuing education instructors would not be included in any bargaining unit - CEP's application for reconsideration of decision regarding continuing education instructors dismissed - Board also directing that unions receive certain access to employer's internal mail system in order to communicate with employees prior to the vote - Board declining CEP's request to postpone vote on ground that employer denied it access to internal mail system as ordered by Board - CEP applying for judicial review of Board's decisions and seeking leave to have application heard by single judge on grounds of urgency under section 6(2) of Judicial Review Procedure Act - Leave granted and application for judicial review dismissed

Board decision not reported.

Ontario Court of Justice (General Division), Archie Campbell J., June 12, 1998.

Archie Campbell J. (endorsement): In view of the pending certification vote on Monday, leave is granted to hear this matter in the General Division under 6(2) of the JRPA. The remedy sought would be largely illusory if this matter is not decided to-day.

As for the alleged unfair employer conduct it was for the alternate chair to balance the urgency of the vote, the departure of employees at the end of the school year, and the implications of derailing the scheduled vote against the seriousness and weight of the alleged noncompliance with his own order. The chair was in an infinitely better position than is the court to assess the potential impact of alleged violations of its own order. It was open to the chair to concluded rationally that the timing of the vote was the paramount consideration. His decision in relation to this aspect of certification is at the heart of his specialized expertise and it is protected by the strong privative clauses in s. 116 of the Labour Relations Act.

As for the decision not to include the evening and weekend general interest continuing education instructors in the bargaining unit, the same principles apply. It is open to the applicant or anyone else to organize them as soon as it is legally possible to do so.

So far as the recon application is concerned, there was an opportunity to make written submissions and there was no denial of natural justice in not allowing oral submissions.

The applicant has not demonstrated that the alternate chair in respect of any decision failed to consider relevant matters. Even if it could be said that there is room for disagreement about any of the orders under review, it cannot be said that they are patently unreasonable in the sense of clearly irrational.

For these reasons the application is dismissed.

0387-96-R;0453-96-U (Court File No. 26355) Wal-Mart Inc., Applicant v. United Steelworkers of America and the Ontario Labour Relations Board, Respondents

Certification - Certification Where Act contravened - Charter of Rights - Constitutional Law - Judicial Review - Representation Vote - Board concluding that conduct of employer in circulating amongst employees and engaging them in individual and group discussions regarding the union violating section 70 of the Act - Employer's refusal to answer questions regarding closing of store if union certified amounting to intentionally generated implied threat to employees' job security and also violating the Act - Board concluding that results of representation vote not disclosing employees' true wishes, that no remedy short of automatic certification sufficient to counter effect of employer contraventions, and that union holding membership support sufficient for collective bargaining - Union certified under section 11 of the Act - Application for judicial review brought by employer and by objecting employees dismissed by Divisional Court - Application for leave to appeal dismissed by Court of Appeal and by Supreme Court of Canada

Board decision reported at [1997] OLRB Rep. Jan./Feb. 141. Divisional Court decision reported at [1997] OLRB Rep. July/Aug. 810. Court of Appeal decision reported at [1997] OLRB Rep. Sept./Oct. 963.

Supreme Court of Canada, Lamer C.J.C. and McLachlin and Iacobucci JJ., May 7, 1998.

The Court (endorsement): The application for leave to appeal is dismissed with costs.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1998

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Under Sec. 11 of the Act

2004-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ventara Construction Ltd. c.o.b. as Carriage Hill Homes (Respondent)

Unit: "all construction labourers in the employ of Ventara Construction Ltd. c.o.b. as Carriage Hill Homes in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

4834-97-R: United Steelworkers of America (Applicant) v. Bennett Chevrolet Geo Oldsmobile Cadillac Ltd. (Respondent)

Unit: "all employees of Bennett Chevrolet Geo Oldsmobile Cadillac Ltd., located at 445 Hespler Rd., in the City of Cambridge, save and except managers, persons above the rank of manager and shop foremen, tower operators, office, clerical and sales staff" (33 employees in unit)

Bargaining Agents Certified Subsequent to Vote

1574-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mark All Services (Respondent)

Unit: "all employees of the responding party in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical, mechanical and sales staff" (23 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	5

3134-97-R: United Steelworkers of America (Applicant) v. Accucut Profile & Grinding Ltd. (Respondent)

Unit: "all employees of Accucut Profile & Grinding Ltd. in the City of Vaughan, save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff and quality control staff" (37 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names appear on voter's list	3

Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	12

3865-97-R: International Brotherhood of Electrical Workers' Local Union 402 (Applicant) v. Marken Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Marken Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Marken Electric Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2

4313-97-R: United Steelworkers of America (Applicant) v. Bay Mills Limited (Respondent)

Unit: "all employees of Bay Mills Limited in the City of Brampton, save and except supervisors and persons above the rank of supervisors, office, clerical and sales staff" (107 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	107
Number of persons who cast ballots	105
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	101
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	53
Number of ballots marked against applicant	46
Number of ballots segregated and not counted	4

4350-97-R: Ontario Nurses' Association (Applicant) v. Services de Santé de Chapleau Health Services (Respondent)

Unit: "all clerical employees employed by Services de Santé de Chapleau Health Services located in Chapleau and at the Gogama and Foley Nursing Stations, save and except for Program Managers, persons above the rank of Program Manager, and the positions of Executive Assistant and Administrative Assistant" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

4394-97-R: United Steelworkers of America (Applicant) v. Riviera Security Services Inc. (Respondent)

Unit: "all Security Guards employed by Riviera Security Services Inc. in the Regional Municipality of Ottawa Carleton, save and except Supervisors, persons above the rank of Supervisor, and office and sales staff" (41 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	8

Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	5
Number of names of persons on revised voters' list	38
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	7

4439-97-R: Labourers' International Union of North America (Applicant) v. East End Construction Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the responding party in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4599-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Warwick (Respondent)

Unit: "all employees of The Corporation of the Township of Warwick in the County of Lambton, save and except office and clerical employees, the Clerk-Treasurer, the Deputy Clerk, the Roads Superintendent, the Arena Manager, the Drainage Superintendent, the Booth Manager, Crossing Guards, students employed for not more than 24 hours per week and students employed full-time during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1

4602-97-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. B.P.B. Westroc Inc. (Respondent)

Unit: "all employees of BPB Westroc Inc., Toronto finishing plant in the City of Toronto, save and except forepersons and persons above the rank of foreperson" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	3

4645-97-R: Brewery, General and Professional Workers' Union (Applicant) v. St. Joseph Immigrant Women's Centre (Respondent)

Unit: "all employees of St. Joseph Immigrant Women's Centre, in the City of Hamilton, save and except Supervisors, persons above the rank of Supervisor, the Accountant and the Administrative Assistant" (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	28
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	8

4716-97-R: Canadian Union of Public Employees (Applicant) v. Continuing Education Students' Association of Ryerson (Respondent)

Unit: "all employees of the Continuing Education Students' Association of Ryerson in the City of Toronto, save and except Executive Director, persons above the rank of Executive Director and persons for whom a trade union held bargaining rights on the date of application" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

4728-97-R: International Union of Operating Engineers Local - 865 (Applicant) v. Iroquois Falls Power Corp. (Respondent)

Unit: "all employees of Iroquois Falls Power Corp. in the Town of Iroquois Falls employed to perform the operation and maintenance of the plant, save and except the general manager and the administrative assistant/confidential secretary/payroll administrator (1 position)" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

4749-97-R: Service Employees' International Union, Local 210 (Applicant) v. Golden Dawn Senior Citizen Home (Respondent)

Unit: "all employees of Golden Dawn Senior Citizen Home at Lions Head, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical, and administrative staff and any other persons represented by another trade union" (49 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	1

4752-97-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Avesta ABE Ltd. (Respondent)

Unit: "all employees of Avesta ABE Ltd. in the City of Brockville, save and except foreman, persons above the rank of foreman, sales staff, office, clerical and technical staff" (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	1

4769-97-R: International Union of Operating Engineers Local 772 (Applicant) v. CleanSoils Limited (Respondent)

Unit: "all employees of CleanSoils Limited in the Regional Municipality of Hamilton Wentworth, save and except Site Supervisors, persons above the rank of Site Supervisor, office staff and clerical staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

4782-97-R: United Steelworkers of America (Applicant) v. Shade-O-Matic Ltd. (Respondent)

Unit: "all employees of Shade-O-Matic Ltd. in the City of Toronto, save and except forepersons, persons above the rank of foreperson, and office, clerical and sales staff" (167 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	167
Number of persons who cast ballots	166
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	144
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of ballots marked in favour of applicant	91
Number of ballots marked against applicant	55
Number of ballots segregated and not counted	19

4802-97-R: Speciality and Temporary Employees Union (Applicant) v. City Wide Services (Respondent)

Unit: "all employees of City Wide Services working in and out of the City of Toronto, save and except managers and persons above the rank of manager" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7

4816-97-R: United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Applicant) v. Quality Inn (Respondent)

Unit: "all employees of Quality Inn at 50 Britannia Road East in the City of Mississauga save and except Assistant Supervisors, persons above the rank of Assistant Supervisor, front desk, office and sales staff and students employed during school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	4

4836-97-R: Canadian Union of Public Employees (Applicant) v. Trent University (Respondent)

Unit: "all employees registered as students at Trent University who are regularly employed for not more than 24 hours per week as Teaching Assistants, Markers, Proctors, Lab Demonstrators or Lab Advisors in the Academic Programs at Peterborough and at the Durham College location, save and except any employees for whom a trade union held bargaining rights on the date of the application" (179 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	179
Number of persons who cast ballots	76
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	69
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	7

4837-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loeb Inc. (Respondent)

Unit: "all employees of Loeb Inc. employed in the Town of Ingersoll, save and except Assistant Store Manager and persons above the rank of Assistant Store Manager, Grocery Manager, Service Manager, Produce Manager, Deli Manager, Meat Manager, Bakery Manager, office employees and management trainees" (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	1

4848-97-R: Canadian Union of Public Employees (Applicant) v. Center for Rational Learning Inc. c.o.b. as Haydon Youth Services (Respondent)

Unit: "all employees of the Center for Rational Learning Inc. c.o.b. as Haydon Youth Services in the Province of Ontario, save and except managers and persons above the rank of manager" (45 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	11

Number of ballots segregated and not counted

6

4887-97-R: Ontario Public Service Employees Union (Applicant) v. The George R. Force Group Homes Inc. (Respondent)

Unit: "all employees of The George R. Force Group Homes Inc., in the Regional Municipality of Niagara and the Regional Municipality of Hamilton-Wentworth, save and except supervisors and persons above the rank of supervisor" (39 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	5

4890-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loeb Inc. c.o.b. Loeb Beechwood (Respondent)

Unit: "all employees of Loeb Inc. c.o.b. Loeb Beechwood located at 50 Beechwood Avenue in the Region of Ottawa Carleton, save and except store director, one assistant director, six department managers, office employees and management trainees" (96 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	96
Number of persons who cast ballots	84
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	84
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	39

4911-97-R: Ontario Public Service Employees Union (Applicant) v. Alcohol and Gaming Commission of Ontario (Respondent)

Unit: "all employees of the Alcohol and Gaming Commission in the Province of Ontario, save and except Investigators, Supervisors and persons above the rank of Supervisor, members of the Human Resources Department, Secretary to the Chair and Administrative Assistant to the Executive Director/CEO" (163 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	163
Number of persons who cast ballots	149
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	136
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	89
Number of ballots marked against applicant	59

4916-97-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. 697243 Ont. Ltd. (o/a Quality Hotel by Journey's End) (Respondent)

Unit: "all employees of the 697243 Ont. Ltd. (o/a Quality Hotel by Journey's End) in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, front desk, office, clerical and sales staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	12

4920-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Gill Machine Works (Ont.) Ltd. (Respondent)

Unit: "all employees of Gill Machine Works (Ont.) Ltd., in the City of Brampton, except supervisors, those above the rank of supervisor, office and clerical staff, engineering and sales staff" (59 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	59
Number of persons who cast ballots	54
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	17

4940-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Glaziers) (Applicant) v. AFGD Glass Centre (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of AFGD Glass Centre in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all glaziers and glaziers' apprentices in the employ of AFGD Glass Centre in all sectors of the construction industry in the City of Toronto (formerly the Municipality of Metropolitan Toronto), the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1

4944-97-R: Karson Kartage & Konstruktion Employees' Association (Applicant) v. Karson Kartage & Konstruktion (1994) Limited (Respondent)

Unit: "all construction labourers, construction industry truck drivers, and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Karson Kartage & Konstruktion (1994) Limited in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	1

4968-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Simcoe Muskoka Catholic District School Board (Respondent)

Unit: "all employees engaged in Maintenance Services with the Simcoe Muskoka Catholic District School Board (District School Board #44), save and except managers, persons above the rank of manager, office and clerical

employees and persons currently covered by other collective agreements" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	1

4994-97-R: Canadian Union of Postal Workers (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of the Hurley Corporation employed to provide cleaning services at Gateway Postal Facility save and except forepersons or persons above the rank of foreperson" (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	18

5014-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Canadian Red Cross Society (Ontario Zone) (Respondent)

Unit: "all employees of The Canadian Red Cross Society (Ontario Zone) in the District of Rainy River, save and except supervisors and persons above the rank of supervisor" (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

5022-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Grey Condominium Corporation No. 37, c.o.b. as Mountain Springs Lodge (Respondent)

Unit: "all employees of Grey Condominium Corporation No. 37, c.o.b. as Mountain Springs Lodge in the Town of Collingwood, save and except supervisors and those above the rank of supervisor" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	3

5040-97-R: Ontario Public Service Employees Union (Applicant) v. Lee Ambulance Service Limited (Respondent)

Unit: "all employees of Lee Ambulance Service Limited in the City of Mississauga regularly employed for not more than 24 hours per week, save and except owner/operator, supervisors, persons above the rank of supervisor, office and clerical staff" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1

0041-98-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Redpath Industries Ltd./Les Industries Redpath Limitée (Respondent)

Unit: "all stationary engineers and sweet water testers employed by Redpath Industries Ltd./Les Industries Redpath Limitée in the boiler and power house of the company at its Toronto refinery, save and except chief engineer(s) and persons above the rank of chief engineer" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	5

0077-98-R: United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Applicant) v. Sunset Motel Limited O/a Best Western Sunset Inn (Respondent)

Unit: "all employees of Sunset Motel Limited o/a Best Western Sunset Inn at 5825 Dixie Road, Mississauga, Ontario, save and except Department Managers, persons above the rank of Department Manger, front desk, office and sales staff, accountant and night auditor, and students employed during the school vacation period" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

0098-98-R: Ontario Nurses' Association (Applicant) v. Grey Bruce Health Services, Centre Grey General Hospital Site (Respondent)

Unit: "all Registered and Graduate Nurses employed in a nursing capacity by Grey Bruce Health Services, Centre Grey General Hospital Site, in the Town of Markdale, save and except Head Nurse and persons above the rank of Head Nurse" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	4

Applications for Certification Dismissed Without Vote

0140-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. Merton Residences Corp./ Martap Developments Limited/Martap Developments 87 Limited/Martap Developments 93 Limited (Respondents)

0366-98-R: Taggart Construction Employees' Association (Applicant) v. Taggart Construction Limited (Respondent) v. Labourers' International Union of North America, Local 247, Labourers' International Union of North America, Local 527 (Intervenors)

Applications for Certification Dismissed Subsequent to Vote

2907-97-R: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Horizon Poultry Products Inc. (Respondent)

Unit: "all maintenance and power services department employees of Horizon Poultry Products Inc. in the Township of Blanchard, save and except persons regularly employed for not more than 24 hours per week, casual employees, foremen and persons above the rank of foreman." (15 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	3

4393-97-R: Canadian Union of Public Employees (Applicant) v. Town of Northeastern Manitoulin and the Islands (Respondent)

Unit: "all employees of the Town of Northeastern Manitoulin and the Islands, save and except Roads Superintendent, Treasurer and office and clerical staff" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	4

4543-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Comtek Advanced Structures Ltd. (Respondent)

Unit: "all employees of Comtek Advanced Structures Ltd., in the City of Burlington, except managers, those above the rank of manager, the controller, those employed in any accounting or finance position and those employed in Human Resources" (30 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	15

4708-97-R: Teamsters Local Union No. 419 (Applicant) v. 733907 Ontario Limited c.o.b. European Quality Meats & Sausages (Respondent)

Unit: "all employees of the 733907 Ontario Limited c.o.b. European Quality Meats & Sausages in the Regional Municipality of Peel, save and except Supervisors, persons above the rank of Supervisor, office and sales staff" (73 employees in unit)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	64
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	32
Number of ballots segregated and not counted	3

4714-97-R: Canadian Union of Public Employees (Applicant) v. Searchmont Resort Inc. (Respondent)

Unit: "all employees of Searchmont Resort in the Town of Searchmont, save and except Managers, persons above the rank of Manager and persons for whom a trade union held bargaining rights on the date of application" (139 employees in unit)

Number of names of persons on revised voters' list	139
Number of persons who cast ballots	98
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	86
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	69
Number of ballots segregated and not counted	8

4882-97-R: United Steelworkers of America (Applicant) v. U-Need-A-Cab Limited (Respondent)

Unit: "all employees of U-Need-A-Cab Limited operating as Taxicab Drivers in the City of London save and except Dispatchers, Call Takers, Road Chiefs, Supervisors, Multi-Plate/Multi-Car Owners/Lessees and Office and Clerical Staff" (411 employees in unit)

Number of names of persons on revised voters' list	411
Number of persons who cast ballots	306
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	99
Number of ballots marked against applicant	164
Number of ballots segregated and not counted	21

4907-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Invacare Canada Inc. (Respondent)

Unit: "all employees of Invacare Canada Inc., in the Regional Municipalities of Peel and York, save and except supervisors, those above the rank of supervisor, office and clerical staff, engineering and sales staff" (9572 employees in unit)

Number of names of persons on revised voters' list	95
Number of persons who cast ballots	94
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	83
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	57
Number of ballots segregated and not counted	5

4957-97-R: National Automobile, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Degussa Canada Ltd. (Respondent)

Unit: "all employees of Degussa Canada Ltd. employed in its Catalyst Division in the City of Burlington, save and except supervisors, those above the rank of supervisor, office and clerical staff, engineering and sales staff" (73 employees in unit)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	70
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	59
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	41
Number of ballots segregated and not counted	11

0015-98-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Agora Food Merchants, Ontario Division, A Division of The Oshawa Group Limited carrying on business as Morningside IGA (Respondent)

Unit: "all employees of Agora Food Merchants, A Division of the Oshawa Group Limited carrying on business as IGA, 1150 Morningside Avenue in the City of Toronto save and except Assistant Manager, those above the rank of Assistant Manager, Meat Manager and Bakery Manager" (99 employees in unit)

Number of names of persons on revised voters' list	107
Number of persons who cast ballots	89
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	85
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	44

0036-98-R: I.W.A. - Canada (Industrial, Wood & Allied Workers of Canada) (Applicant) v. Value Woodworking Limited (Respondent)

Unit: "all employees of Value Woodworking Ltd. in the Regional Municipality of Peel, save and except assistant manager, persons above the rank of assistant manager, sales staff, office and clerical staff" (126 employees in unit)

Number of names of persons on revised voters' list	130
Number of persons who cast ballots	123
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	111
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	67

0054-98-R: Labourers' International Union of North America (Applicant) v. Exclusive Carpentry Enterprises Limited and/or A-C Joe Banchieri Carpenters (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of Exclusive Carpentry Enterprises Limited and/or A-C Joe Banchieri Carpenters engaged in residential construction in the province of Ontario, save and except office and sales staff and non-working foremen and persons above the rank of non-working foreman." (7 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	6

0097-98-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Conkrisda Holdings Limited, c.o.b. Howard Johnson Hotel - London (Respondent)

Unit: "all employees working at the Howard Johnson Hotel in the City of London, Ontario, save and except supervisors and persons above the rank of supervisor." (60 employees in unit)

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	51
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	39
Number of ballots segregated and not counted	2

Applications for Certification Withdrawn

3971-96-R: International Union of Operating Engineers, Local 793 (Applicant) v. Black Bird Holding Ltd. (Respondent) (*Terminated*)

4347-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Balmain Construction Limited (Respondent) (*Terminated*)

0145-98-R: International Union of Bricklayers and Allied Craftsmen, Local 7 (Applicant) v. Rose Mechanical Ltd. (Respondent)

0217-98-R: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 759 (Applicant) v. Enerdry Constructors Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3375-96-R: United Brotherhood of Carpenters and Joiners of America, Local 93 and United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. The Cadillac Fairview Corporation Limited, Cadillac Fairview (Ontario) Holdings Limited, Cadillac Fairview Inc., St. Laurent Shopping Centre Limited, 713949 Ontario Limited, Sears Canada Inc., Cadillac Fairview/JMB Properties, Devan Properties Ltd., Canadian Diners (1995) Limited Partnership (Respondents) (*Endorsed Settlement*)

1078-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lakeview Estates, Antrex Development Corporation, Cordoba Estates, Barmont Homes (Respondents) (*Withdrawn*)

2053-97-R: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. A. C. & I. Environmental Inc. and Johnson - Archibald Insulation Co. Inc. (Respondents) (*Withdrawn*)

2395-97-R: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Beaver Lumber Co. Ltd. and Beaver Lumber Co. Ltd. Operating as Manning Road Building Materials Ltd. (Respondents) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 (Intervener) (*Dismissed*)

2504-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Townwood Homes Limited and Rosehaven Homes Limited (Respondents) (*Withdrawn*)

2599-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Delrock Drywall Systems Ltd. and Speed-Tech Drywall Systems Ltd. (Respondents) (*Granted*)

3035-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. International Contractors Inc. and Marvin & Sinclair Developments Inc. (Respondents) (*Granted*)

3870-97-R: Graphic Communications Union, Local 41M (Applicant) v. Mutual/Hadwen Imaging Technologies Inc., Mutual/Hadwen Inc., Mutual/Hadwen Printing and Digital Services, Harpell Printing Ottawa Inc., Harpell Printing Inc. (Respondents) (*Granted*)

4662-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sipico Drywall Construction Limited and Marsand Contracting Inc. (Respondents) (*Endorsed Settlement*)

4839-97-R: International Brotherhood of Painters & Allied Trades, District Council 46 (Applicant) v. Royal Decorating, Division of J. S. Decorators Limited and Fine Decorating Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3375-96-R: United Brotherhood of Carpenters and Joiners of America, Local 93 and United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. The Cadillac Fairview Corporation Limited, Cadillac Fairview (Ontario) Holdings Limited, Cadillac Fairview Inc., St. Laurent Shopping Centre Limited, 713949 Ontario Limited, Sears Canada Inc., Cadillac Fairview/JMB Properties, Devan Properties Ltd., Canadian Diners (1995) Limited Partnership (Respondents) (*Endorsed Settlement*)

1078-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lakeview Estates, Antrex Development Corporation, Cordoba Estates, Barmont Homes (Respondents) (*Withdrawn*)

2053-97-R: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. A. C. & I. Environmental Inc. and Johnson - Archibald Insulation Co. Inc. (Respondents) (*Withdrawn*)

2395-97-R: United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Beaver Lumber Co. Ltd. and Beaver Lumber Co. Ltd. Operating as Manning Road Building Materials Ltd. (Respondents) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 (Intervener) (*Dismissed*)

2504-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Townwood Homes Limited and Rosehaven Homes Limited (Respondents) (*Withdrawn*)

2599-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Delrock Drywall Systems Ltd. and Speed-Tech Drywall Systems Ltd. (Respondents) (*Granted*)

3035-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. International Contractors Inc. and Marvin & Sinclair Developments Inc. (Respondents) (*Granted*)

3870-97-R: Graphic Communications Union, Local 41M (Applicant) v. Mutual/Hadwen Imaging Technologies Inc., Mutual/Hadwen Inc., Mutual/Hadwen Printing and Digital Services, Harpell Printing Ottawa Inc., Harpell Printing Inc. (Respondents) (*Granted*)

4662-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sipico Drywall Construction Limited and Marsand Contracting Inc. (Respondents) (*Endorsed Settlement*)

4839-97-R: International Brotherhood of Painters & Allied Trades, District Council 46 (Applicant) v. Royal Decorating, Division of J. S. Decorators Limited and Fine Decorating Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2899-97-R: Deborah Owchar (on behalf of employees) (Applicant) v. Hotel Employees' Restaurant Employees, Local 75, (H.E.R.E.) (Respondent) v. Windsor Raceway Inc. (Intervener)

Unit: "all employees of Windsor Raceway within the food and beverage department, save and except assistant managers and persons above the rank of assistant manager, office & clerical staff, persons regularly employed for not more than two racing programs per week, maitre'd hotel, head chef, sous chef, cooks, apprentice cook and central cashiers" (82 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	83
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names appear on voter's list	17
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	31
Number of ballots marked against respondent	34
Number of ballots segregated and not counted	17

4311-97-R: Ken Williams (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 880 (Respondent) v. Tilbury Concrete Transport Inc. (Intervener)

Unit: "all employees in the ready-mix department, save and except those in a supervisory capacity, office workers and engineers, in Essex and Kent Counties" (17 employees in unit) (*Dismissed*)

4585-97-R: Employees of Pernfuss Roofing (Applicant) v. Sheet Metal Workers' International Association, Local 562 (Respondent) v. Pernfuss Roofing (Ont.) Ltd. (Intervener)

Unit: "The employer recognizes the union as the exclusive bargaining agent or all or their employees performing work covered by the terms and conditions of this Agreement in the commercial, industrial and institutional sectors and new high rise structures in all other sectors, except work covered in the Collective Agreement of the Electrical Power Systems Construction Association and the Union of the construction industry in all geographic areas in the Province of Ontario as described in Appendix A." (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked against respondent	3

4596-97-R: Kenneth Forsythe, Harry Delorme and Gary Gazankas (Applicant) v. International Brotherhood of Electrical Workers, Local 402 and The IBEW Construction Council of Ontario (Respondents) v. Ken Anderson Electric Inc. (Intervener)

Unit: "all Foremen, Journeyman Wiremen, Instrumentation Electricians, Apprentices, Journeyman Linemen-Splicers, Apprentice Linemen-Splicers, Groundman/Equipment Operators, Groundman/Drivers, Groundmen, Utilitymen and Foresters performing work within the acknowledged jurisdiction of the Union, as defined in Section 139(2) of the OLRA" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3

Number of ballots marked against respondent 3

4627-97-R: Richard Jordan (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Pine Hill Youth Residence Ltd. (Intervener)

Unit: "all employees of Pinehill Youth Residence Ltd. in the Township of Sullivan, save and except Shift Supervisors and persons above the rank of Shift Supervisor" (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	12
Number of ballots segregated and not counted	3

4685-97-R: Christopher Wittig (Applicant) v. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario representing the following affiliated Local Unions 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, 1739 (Respondent) v. Christopher Wittig Holdings Ltd. (Intervener) (*Dismissed*)

4715-97-R: Mark Morden (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Respondent) v. Cashway Building Centres Ltd. (Intervener)

Unit: "all employees of Cashway Building Centres Inc. in the City of Windsor, save and except assistant forepersons and persons above the rank of forepersons" (41 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of ballots marked in favour of respondent	21
Number of ballots marked against respondent	15

4717-97-R: Dave Mussio (Applicant) v. International Brotherhood of Electrical Workers, Local 773, I.B.E.W. Construction Council of Ontario (Respondent) v. 813842 Ontario Ltd. o/a C & C Electric (1992) (Intervener)

Unit: "all Foremen, Journeyman Wiremen, Instrumentation Electricians, Apprentices, Journeyman Linemen-Splicers, Apprentice Linemen-Splicers, Groundman/Equipment Operators, Groundman/Drivers, Groundmen, Utilitymen and Foresters performing work within the acknowledged jurisdiction of the Union, as defined in Section 139(2) of the OLRA" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked against respondent	2

4754-97-R: Matteo Galeano (Applicant) v. IBEW Construction Council of Ontario (Respondent) v. Lancor Electric (1996) Ltd. (Intervener) (*Dismissed*)

4819-97-R: Andrew Kendall (Applicant) v. International Brotherhood of Painters and Allied Trades, Sign and Pictorial Painters, Local 1630 (Respondent)

Unit: "all employees of Smith Sign Company Limited working in the Markham, Ontario plant, other than: (i) Employees acting in a confidential capacity or having authority to employ, discharge or discipline employees; (ii) Office and sales staff" (9 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9

4874-97-R: Maurice Beaudoin (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1090 (Respondent) v. Venest Industries, a division of Cosma International Inc. (Intervener)

Unit: "all employees of Venest Industries, a division of Cosma International Inc., in the City of St. Catharines, save and except forepersons, persons above the rank of foreperson, office, technical and sales staff" (51 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	51
Number of ballots marked in favour of respondent	21
Number of ballots marked against respondent	30

4877-97-R: Bill Yando et al (Applicant) v. Ontario Council of the Brotherhood of Painters and Allied Trades and Glaziers and Metal Mechanics, Local 1795 (Respondent)

Unit: "all hourly rated employees, save and except management personnel, office and sales staff, guards, supervisors and those above the rank of supervisor, employed at Brisk-All Glass, 4485 Kent Avenue, Niagara Falls, Ontario, L2H 1J1" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

5017-97-R: Percy Millions (Applicant) v. International Brotherhood of Electrical Workers, Local Union 1687 (Respondent) (*Withdrawn*)

0179-98-R: Terry Badour (Applicant) v. International Union of Bricklayers and Allied Craftworkers, Local 10 and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Respondent) v. Cupido Construction (1989) Limited (Intervener) (*Withdrawn*)

0200-98-R: Kirk Rowe (Applicant) v. International Brotherhood of Electrical Workers, the IBEW Construction Counsel of Ontario and the International Brotherhood of Electrical Workers, Local 353 (Respondent) v. Northview Electrical Contractors, A Division of 697235 Ontario Ltd. (Intervener) (*Terminated*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0100-98-U: Mackie Automotive Systems (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 222, Lorna Moses, Michael Shields, Vivian Terrelonge, Shannon Dewitt, Al Heckbert, Greg Bindt, Donna Cannons, Ray Bindt, Darren Brown, Richard Bedore, Delbert Bedore, and Lance Daunham (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

4077-95-U: Power Workers' Union - Canadian Union of Public Employees, Local 1000 ("PWU") and J. Caskanette, G.D. Chaffey, M.D. Collins, L. Crausen, H.R. Gillies, R.C. Hansen, G. O'Donnell, J. Stark, R. Thoms, H. Tomsett and R.R. Young (Applicant) v. International Brotherhood of Electrical Workers in its own right and as

trustee of International Brotherhood of Electrical Workers, Local 1788, Ken Woods, Allan Diggon, Tom McGreevy, Ontario Hydro and Electrical Power Systems Construction Association ("EPSCA") (Respondents) v. The IBEW Electrical Power Systems Construction Council of Ontario (Intervener) (*Withdrawn*)

0836-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1256 (Applicant) v. Long Manufacturing Ltd. (Respondent) (*Dismissed*)

1992-96-U: International Brotherhood of Electrical Workers Local Union 1788 ("IBEW, Local 1788") (Applicant) v. International Brotherhood of Electrical Workers, Ken Woods, Allan Diggon and Jim Seaton (Respondents) v. The IBEW Electrical Power Systems Construction Council of Ontario and Electrical Power Systems Construction Association (Interveners) (*Terminated*)

0468-97-U: Jeff A. J. Reid (Applicant) v. Canadian Union of Public Employees, Local 576 (Respondent) (*Dismissed*)

0671-97-U: Sinnathurai Kamala Chandra (Applicant) v. Local United Association 787 (Respondent) v. Black & McDonald Limited (Intervener) (*Dismissed*)

0836-97-U: Marina D. Ruiz (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) v. Delta Chelsea Inn (Intervener) (*Dismissed*)

1599-97-U: Guy Tessier (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 819 (Respondent) (*Withdrawn*)

1820-97-U: Gerard Benoit (Applicant) v. Amalgamated Transit Union, Local 1573 (Respondent) v. The Corporation of the City of Brampton (Brampton Transit) (Intervener) (*Dismissed*)

1999-97-U: Hotel Employees Restaurant Employees Union, Local 75 of the Hotel Employees and Restaurant Employees International Union (Applicant) v. 928598 Ontario Ltd. (Respondent) v. Service Employees' International Union, Local 210 (Intervener) (*Withdrawn*)

2179-97-U: Teresa Campo (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 975 (Respondent) v. Consumers Gas Company (Intervener) (*Withdrawn*)

2833-97-U: Canadian Union of Operating Engineers and General Workers (Applicant) v. Pet-Pak Containers Inc. (Respondent) (*Withdrawn*)

2986-97-U: United Food and Commercial Workers, Local 1227 (Applicant) v. Fearmans Fresh Meats, a Division of Fearmans Inc., also known as Maple Leaf Pork, A Division of Maple Leaf Meats Inc. (Respondent) (*Withdrawn*)

3058-97-U; 3287-97-U: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. R. M. Belanger Limited (Respondent) (*Granted*)

3103-97-U: Ontario Nurses' Association (Applicant) v. Comcare (Canada) Limited (Respondent) (*Dismissed*)

3113-97-U: Frank Esposito (Applicant) v. CUPE Local 79 and The Municipality of Metropolitan Toronto (Respondents) (*Dismissed*)

3179-97-U: Imad Lodhi (Applicant) v. Medis Health & Pharmaceutical Services Inc. (Respondent) (*Withdrawn*)

3594-97-U: United Food and Commercial Workers International Union, Local 617P (Applicant) v. Maple Leaf Foods Inc. c.o.b. as Maple Leaf Meats (Respondent) (*Withdrawn*)

3764-97-U: Domenico Quistini (Applicant) v. Bakery Confectionery and Tobacco Workers International Union, AFL-CIO, CLC Local 264 (Respondent) (*Withdrawn*)

3789-97-U: Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Jack Bird Plumbing & Heating Ltd. (Respondent) (*Endorsed Settlement*)

3794-97-U: Rod Brent (Applicant) v. A.B.T. Co. and United Steelworkers Union (Respondents) (*Withdrawn*)

3862-97-U: Susan Sarvas et al. (Applicant) v. Ontario Nurses' Association - Local 73 (Respondent) v. Thunder Bay Regional Hospital (Intervener) (*Withdrawn*)

3869-97-U: Graphic Communications Union, Local 41M (Applicant) v. Mutual/Hadwen Imaging Technologies Inc., Mutual/Hadwen Inc., Mutual/Hadwen Printing and Digital Services, Harpell Printing Ottawa Inc., Harpell Printing Inc. (Respondents) (*Granted*)

3925-97-U: Josette M. Reaume, Margaret Garabon, Debbie Unholzer, Julie West, Mary Mardegan, Lillian Dajas (Applicant) v. Service Employees' Union Local 210 (Respondent) (*Withdrawn*)

4099-97-U: Graphic Communications International Union, Local 500M (Applicant) v. GHQ Imaging Inkjet Productions Limited (Respondent) (*Withdrawn*)

4304-97-U: John Maurice Lelacheur (Applicant) v. Labourers' International Union of North America, "Local 183" (Respondent) (*Withdrawn*)

4307-97-U: Trina L. Collins (Applicant) v. Paula & Danny Randazzo L.I.U.N.A. (Respondent) (*Withdrawn*)

4428-97-U: Drywall Acoustic Lathing and Insulation, Local 675 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Technique Contracting Inc. (Respondent) (*Dismissed*)

4466-97-U: Agustus Mullins (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Respondent) (*Withdrawn*)

4553-97-U: Marjory Brannon (Applicant) v. National Automobile Aerospace and Agricultural Implement Workers Union of Canada and its Local 1324 and Ford Motor Company of Canada, Limited and Roz Monchamp and Brian Feil (Respondents) (*Terminated*)

4566-97-U: Brewery, General and Professional Workers' Union and Ivan Rivers (Applicant) v. The Oakville Club (Respondent) (*Withdrawn*)

4607-97-U: Christian Labour Association of Canada (Applicant) v. 1066269 Ontario Ltd. o/a John Joseph Place and 1200094 Ontario Ltd. o/a Central Place (The Landen Group) (Respondent) (*Dismissed*)

4611-97-U: John Levely (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Respondent) (*Withdrawn*)

4622-97-U: United Food and Commercial Workers, Local 1227 (Applicant) v. Maple Leaf Pork, A Division of Maple Leaf Meats Inc. (Respondent) (*Withdrawn*)

4644-97-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 880 (Applicant) v. Beaver Lumber Co. Ltd. and Beaver Lumber Co. Ltd., operating as Manning Road Building Materials Ltd., and United Brotherhood of Carpenters and Joiners of America, Local 3054 (Respondents) (*Withdrawn*)

4658-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Comtek Advanced Structures Ltd. (Respondent) (*Withdrawn*)

4718-97-U: Patrick Lee Ostrowalker (Applicant) v. United Steelworkers of America, Local 6500 (Respondent) v. Inco Ltd. Ontario Division (Intervener) (*Dismissed*)

4747-97-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Applicant) v. M.C. Colonial Cabinets and Millwork Ltd. (Respondent) (*Withdrawn*)

4760-97-U: Maple Leaf Pork, A Division of Maple Leaf Meats Inc. (Applicant) v. United Food and Commercial Workers Union, Local 1227 (Respondent) (*Withdrawn*)

4808-97-U: Sheet Metal Workers' International Association, Local 540 (Applicant) v. Kindred Industries (Division of Emco Limited) (Respondent) (*Withdrawn*)

4835-97-U: United Steelworkers of America (Applicant) v. Bennett Chevrolet Geo Oldsmobile Cadillac Ltd. (Respondent) (*Terminated*)

4955-97-U: Teamsters Local Union No. 419 (Applicant) v. 733907 Ontario Limited c.o.b. European Quality Meats & Sausages (Respondent) (*Withdrawn*)

4966-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Access Alliance Multicultural Community Health Centre (Respondent) (*Withdrawn*)

4973-97-U: Communications, Energy and Paperworkers Union of Canada and its Local 333-32 (Applicant) v. The Responsive Marketing Group (Respondent) (*Withdrawn*)

4974-97-U: Canadian Union of Public Employees Local 3798 (Applicant) v. Pilot Place Society (Respondent) (*Withdrawn*)

4978-97-U: Agnieszka Chudzik (now Agnieszka Kaczmarczyk) (Applicant) v. Custom Trim Ltd., U.S.W.A. Local 1090 (Respondents) (*Dismissed*)

0031-98-U: Chris Sumblar (Applicant) v. Can-Eng (Respondent) (*Dismissed*)

0032-98-U: Wallace H. Hennessy (Applicant) v. The Brotherhood of Carpenters and Joiners and Local 1071 (Respondent) (*Dismissed*)

0042-98-U: Paul Conway, Walter Willoughby, Dan Elliot (Applicant) v. GE Canada (Respondent) (*Dismissed*)

0074-98-U: Gerrie Fournier (Applicant) v. Lennox Ind. (Respondent) (*Dismissed*)

0108-98-U: Bijar Gurnam Singh and Ira Johnson (Applicant) v. United Food and Commercial Workers International Union (Respondent) (*Dismissed*)

0226-98-U: Patricia Linton (Applicant) v. Regency Manor, Cynthia Knight and Daile Eaton (Respondent) (*Dismissed*)

0230-98-U: Esmeline Cameron (Applicant) v. International Union Local 204 (Respondent) (*Dismissed*)

0240-98-U: Mrs. Lolita Dam (Applicant) v. United Steelworker of America (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

4953-97-M: Brewery, General and Professional Workers' Union (Applicant) v. Med-Chem Laboratories Ltd. (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

4027-95-JD: Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. Nicholls-Radtke Ltd., TESC Contracting Company Limited,

Ged-Ven Fabricating and Erection Ltd., International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Withdrawn*)

2417-97-JD; 2440-97-JD: Millwright District Council of Ontario and its Local 1916 (Applicant) v. Adam Clark Company Ltd. and Sheet Metal Workers' International Association, Local 562 (Respondents); International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736, Ironworkers District Council of Ontario and (Applicants) v. Adam Clark Company Ltd. and Sheet Metal Workers' International Association, Local 562 (Respondents) (*Withdrawn*)

2489-97-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663 (Applicant) v. Kel-Gor Limited and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Dismissed*)

2845-97-JD: Iron Workers District Council of Ontario and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. The State Group Limited and Millwright District Council of Ontario and its Local 1007 (Respondents) (*Granted*)

3317-97-JD: Abitibi-Consolidated Corporation (Applicant) v. International Association of Machinists and Aerospace Workers, Lodge 771 and International Brotherhood of Electrical Workers, Local 1744 (Respondents) (*Dismissed*)

3333-97-JD: Labourers' International Union of North America, Local 1059 (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 736, Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Granted*)

4135-97-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Labourers' International Union of North America, Local 1089, Chemfab Mechanical Contractors (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0986-97-M: Public Service Alliance of Canada (PSAC) (Applicant) v. Canadian Union of Labour Employees (CULE) (Respondent) (*Granted*)

3152-97-M: Canadian Union of Public Employees and its Local 2753 (Applicant) v. The Corporation of the City of Kanata (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3827-97-OH: Russell Fulton (Applicant) v. Cosmetics Laboratories Inc., Daniel Scott, Sandra Scott, Ian Elliot, V.P. (Respondents) (*Granted*)

4477-97-OH: Georgina Heyden (Applicant) v. Jaycee Herb Traders Ltd. (Respondent) (*Granted*)

4593-97-OH: John Levely (Applicant) v. Little Folks (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Intervener) (*Withdrawn*)

4895-97-OH: Mato Tomasevic (Applicant) v. Image Pac (Respondent) (*Dismissed*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT - EMPLOYEE STATUS

3730-95-M: Ontario Public Service Employees Union (OPSEU) (Applicant) v. The Crown in Right of Ontario represented by Management Board of Cabinet (Respondent) (*Granted*)

3756-95-M: Association of Management, Administrative and Professional Crown Employees of Ontario (AMAP-CEO) (Applicant) v. The Crown in Right of Ontario represented by Management Board of Cabinet (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

4153-95-G; 4157-95-G; 4161-95-G; 4162-95-G: Labourers' International Union of North America (Applicant) v. Ventura Construction (Respondent); Labourers' International Union Of North America (Applicant) v. A.B.T. Tile & Marble Co. (Respondent); Labourers' International Union of North America (Applicant) v. Zoppas Construction Ltd. (Respondent); Labourers' International Union of North America (Applicant) v. West Front Const. Ltd. (Respondent) (*Withdrawn*)

3376-96-G: United Brotherhood of Carpenters and Joiners of America, Local 93 and United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. The Cadillac Fairview Corporation Limited, Cadillac Fairview (Ontario) Holdings Limited, Cadillac Fairview Inc., St. Laurent Shopping Centre Limited, 713949 Ontario Limited, Sears Canada Inc., Cadillac Fairview/JMB Properties, Devan Properties Ltd., Canadian Diners (1995) Limited Partnership (Respondents) (*Endorsed Settlement*)

0275-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Applicant) v. Honeywell Limited (Respondent) (*Granted*)

0648-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lakeview Estates Ltd. (A Division of the Antrex Group), Cordoba Estates, Barmount Homes (Respondents) (*Withdrawn*)

1773-97-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Nicholls-Radtke Ltd., and (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 446 (Intervener) (*Withdrawn*)

2503-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Townwood Homes Limited and Rosehaven Homes Limited (Respondents) (*Withdrawn*)

2597-97-G; 2598-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Delrock Drywall Systems Ltd. and Speed-Tech Drywall Systems Ltd. (Respondents) (*Granted*)

3783-97-G: Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Jack Bird Plumbing and Heating Ltd. (Respondent) (*Endorsed Settlement*)

4142-97-G; 4143-97-G; 4144-97-G: United Brotherhood of Carpenters and Joiners of America - Lake Ontario District Council (Applicant) v. Peacock Interior Finishes (Respondent) (*Withdrawn*)

4154-97-G: United Brotherhood of Carpenters and Joiners of America - Lake Ontario District Council (Applicant) v. Cooler Guys Inc. (Respondent) (*Granted*)

4367-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Via Roofing Inc. (Respondent) (*Withdrawn*)

4391-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sipico Drywall Construction Ltd. and, Marsand Contracting Inc. (Respondents) (*Endorsed Settlement*)

4791-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. 1234043 Ontario Inc., o/a Plaza Electric Co. (Respondent) (*Granted*)

4804-97-G: International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Basile Interiors Ltd. (Respondent) (*Granted*)

4820-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Dominion Bridge, Inc. (Respondent) (*Withdrawn*)

4863-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Elmford Construction Company Limited (Respondent) (*Granted*)

4923-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Interac Contractors (Respondent) (*Granted*)

4926-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Scotco Insulation (Respondent) (*Withdrawn*)

4943-97-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. North End Interiors Ltd. (Respondent) (*Withdrawn*)

4950-97-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. 1014097 Ontario Limited c.o.b. as Acu-Vent Air Systems (Respondent) (*Granted*)

4952-97-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2486 (Applicant) v. Carwood Store Fixtures Limited (Respondent) (*Withdrawn*)

4964-97-G: International Union of Bricklayers and Allied Craftworkers Local 2, Toronto/Barrie, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Applicants) v. T.C. Bricklayers (Respondent) (*Endorsed Settlement*)

0003-98-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Bison Contracting (Respondent) (*Withdrawn*)

0081-98-G: International Brotherhood of Electrical Workers, Local Union 303, Canada (Applicant) v. Rimwood Electrical Services Inc. (Respondent) (*Granted*)

0085-98-G; 0086-98-G: International Union of Bricklayers & Allied Craftworkers Local 2, Toronto/Barrie (Applicant) v. Par Bros. Ltd. (Respondent) (*Granted*)

0128-98-G: International Union of Operating Engineers, Local 793 (Applicant) v. Moir Crane Service and Machinery Movers Ltd. (Respondent) (*Withdrawn*)

0131-98-G: Sheet Metal Workers' International Association, Local Union No. 285, on its own behalf and on behalf of the Trustees of the Sheet Metal Workers' Union Local 285 Pension Trust Fund and the Sheet Metal Workers' Local Union Local 285 Benefit Trust Fund (collectively the 'Trust Funds') (Applicant) v. The Watson Group Ltd. (Respondent) (*Withdrawn*)

0175-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Speed Electric Limited (Respondent) (*Withdrawn*)

0185-98-G: International Union of Operating Engineers, Local 793 (Applicant) v. Elmroad Construction Co. Limited (Respondent) (*Granted*)

0186-98-G: International Union of Operating Engineers, Local 793 (Applicant) v. Rose Mechanical Ltd. (Respondent) (*Endorsed Settlement*)

0196-98-G: Millwright Regional Council of Ontario (Applicant) v. Rose Mechanical Ltd. (Respondent) (*Granted*)

0211-98-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. M & M Steel Erectors (Respondent) (*Withdrawn*)

0236-98-G: Construction Workers Local 53, CLAC (Applicant) v. A Dynasty Roofing (Respondent) (*Withdrawn*)

APPLICATIONS UNDER THE EDUCATION ACT, (277.14(7))

4984-97-M: Ontario Secondary School Teachers' Federation, District 27 (Applicant) v. The Limestone District School Board (Respondent) (*Granted*)

0005-98-M: Avon Maitland District School Board (Applicant) v. OSSTF - Districts 22 and 45 (Respondent) (*Granted*)

0040-98-M: Ontario Secondary School Teachers' Federation of District School Board #9 (Applicant) v. Greater Essex County District School Board (Respondent) (*Granted*)

0069-98-M: Ontario English Catholic Teachers' Association (Applicant) v. Northeastern Catholic District School Board (Respondent) (*Granted*)

0079-98-M: Bluewater District School Board (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) (*Granted*)

0103-98-M; 0117-98-M: L'Association des enseignantes et des enseignants franco-ontariens, palier secondaire (Applicant) v. le Conseil scolaire de L'Est catholique no. 65 (Respondent); L'Association des enseignantes et des enseignants franco-ontariens, palier élémentaire (Applicant) v. le Conseil scolaire de l'Est catholique no. 65 (Respondent) (*Granted*)

0157-98-M: Federation of Women Teachers' Associations of Ontario and the Ontario Public School Teachers' Federation (Applicant) v. Hamilton-Wentworth District School Board (Respondent) (*Terminated*)

0176-98-M: Ontario Public School Teachers' Federation and Federation of Women Teachers' Associations of Ontario (Applicant) v. District School Board of Niagara (Respondent) (*Granted*)

0188-98-M: Ontario English Catholic Teachers Association (Applicant) v. Eastern Ontario Catholic District School Board (Respondent) (*Granted*)

0189-98-M: L'Association des enseignantes et des enseignants franco-ontariens (Applicant) v. Le Conseil scolaire public du district Centre-Sud- Ouest (Respondent) (*Granted*)

0256-98-M: Algoma District Ontario Secondary School Teachers' Federation (Applicant) v. Algoma District School Board (Respondent) (*Endorsed Settlement*)

0308-98-M: Ontario English Catholic Teachers Association (Applicant) v. Ottawa-Carleton Catholic District School Board (Respondent) (*Withdrawn*)

0311-98-M: Ontario English Catholic Teachers Association (Applicant) v. District Catholic School Board #55 (Respondent) (*Granted*)

0338-98-M: Ontario Secondary School Teachers Federation District 22 (Applicant) v. District School Board of Niagara (Respondent) (*Granted*)

0348-98-M: Federation of Women Teachers' Associations of Ontario and The Ontario Public School Teachers' Federation (Applicants) v. District School Board of Niagara (Respondent) (*Terminated*)

0407-98-M: L'Association des enseignantes et des enseignants franco-ontariens (Applicant) v. le Conseil Aurores boréales (no. 62) (Respondent) (*Endorsed Settlement*)

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

4928-97-PS: Haliburton Highlands Health Services (Applicant) v. Canadian Union of Public Employees and Service Employees International Union, Local 478 (Respondents) (*Dismissed*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1824-96-U: Trudy Morris (Applicant) v. United Steelworkers of America, Local 14857 (Respondent) (*Denied*)

2048-96-U: Victor Mazarello (Applicant) v. Canadian Union of Public Employees, Local 218 (Respondent) v. Durham Region Roman Catholic Separate School Board (Intervener) (*Denied*)

0058-97-R: West Parry Sound Health Centre (Applicant) v. Canadian Union of Public Employees, Local 1473, Ontario Public Service Employees Union, Local 320 and Service Employees' Union, Local 478 (Respondents) (*Granted*)

1052-97-U; 1053-97U: Hospitality, Commercial and Service Employees Union, Local 73 chartered by Hotel Employees Restaurant Employees International Union (Applicant) v. Societa Italiana Di Benevolenza Principe Di Piemonte c.o.b. as the Da Vinci Centre (Respondent) (*Dismissed*)

1437-97-U: Mohamed Elkhatab (Applicant) v. International Brotherhood of Boilermakers, Local 128 (Respondent) v. O'Connor Tanks Limited (Intervener) (*Dismissed*)

1704-97-JD: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Labourers' International Union of North America, Local 183, Labourers' International Union of North America, Local 837, Labourers' International Union of North America, Local 506, Labourers' International Union of North America, Ontario Provincial District Council, Well-Bur Construction Ltd., and Granville Constructors Ltd. (Respondents) (*Denied*)

1876-97-U: Salvatore Ingraldi (Applicant) v. Amalgamated Transit Union - Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

3576-97-G: International Union of Operating Engineers, 793 (Applicant) v. Williams Contracting Ltd. (Respondent) (*Dismissed*)

3624-97-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Limited (Respondent) v. The United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) (Intervener) (*Denied*)

4734-97-U: Harvinder Ahluwalia (Applicant) v. CAW Local 124 (Respondent) (*Denied*)

0005-98-M: Avon Maitland District School Board (Applicant) v. OSSTF - Districts 22 and 45 (Respondent) (*Granted*)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1998

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1973-94-R: Labourers' International Union of North America Local 607 (Applicant) v. E. & E. Seegmiller Limited (Respondent)

Unit: "all construction labourers in the employ of E. & E. Seegmiller Limited in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (42 employees in unit)

1332-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lancia Tile Ltd. (Respondent) v. Toni Di Cristofaro, Dominic Di Cristofaro, Mario Cantatore, Derek Czechowski, Giuseppe Rizzo, George Fischer, Stanley Martynowski, Steve Kostuch, John Colasurdo (Intervener)

Unit: "all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers, improvers and their helpers in the employ of Lancia Tile Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the City of Toronto (formerly the Municipality of Metropolitan Toronto), the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (0 employees in unit)

1941-95-R: United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. 996421 Ontario Inc., carrying on business as Tim Hortons at Stores #630 and #1091, and 996422 Ontario Inc. carrying on business as Tim Hortons at Store #55 (Respondent) v. Group of Employees (Intervener)

Unit: "all employees of 996421 Ontario Inc. and of 996422 Ontario Inc., carrying on business as Tim Hortons, employed in the city of Sudbury, save and except the Manager and persons above the rank of manager" (39 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2956-96-R: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all roofers in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all roofers in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	13

Number of ballots marked against applicant

0

2957-96-R: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	1

2764-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dunbury Homes (Holly) Ltd. (Respondent)

Unit: "all construction labourers in the employ of Dunbury Homes (Holly) Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	1
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	1

3108-97-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Best Western Primrose Hotel (Respondent)

Unit: "All employees employed as Night Auditors at the Best Western Primrose Hotel, in the Municipality of Metropolitan Toronto, Ontario" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3583-97-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. The Corporation of the City of St. Thomas (Valleyview Home for the Aged) (Respondent) v. London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Intervener)

Unit: "all employees of the Corporation of the City of St. Thomas at Valleyview Home for the Aged at St. Thomas, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff" (64 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	57
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	25

4482-97-R: University of Western Ontario Faculty Association (Applicant) v. University of Western Ontario (Respondent)

Unit: “all persons employed as members of the academic staff at The University of Western Ontario, in the City of London, having full responsibility at least equivalent to that associated with teaching one full university degree credit course in any calendar year, save and except: (a) full voting members of the Board of Governors; (b) persons who hold any position in the University at, or equivalent to, or higher than the rank of Associate Dean or above, including but not restricted to, Dean, Vice-Provost, Vice-Presidents, the President, and anyone who is appointed to act in these positions; (c) persons employed in a professional capacity as per Subsection 1(3)[(a)] of the *Labour Relations Act*; (d) persons holding visiting appointments while on leave from another university, institution, firm or government agency, unless: (i) they hold an academic appointment at The University of Western Ontario at London; (ii) they carry full responsibility at least equivalent to that associated with teaching one full University degree credit course in any calendar year at The University of Western Ontario at London; and (iii) they are on leave without salary from their home university, institution, firm or government agency; (e) persons seconded to positions providing confidential assistance to the President, the Provost, the Vice-Provost or a Vice-President of The University of Western Ontario. (f) persons seconded for a term of not less than one year to a non-academic administrative position, so long as it is the secondee’s principal responsibility; (g) persons for whom a trade union held bargaining rights at The University of Western Ontario as of the date of this application to the Ontario Labour Relations Board; (h) retired academic staff except insofar as such persons come within the bargaining unit independently of their status as retired academic staff;” (0 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	1283
Number of persons who cast ballots	949
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	892
Number of segregated ballots cast by persons whose names appear on voter’s list	19
Number of segregated ballots cast by persons whose names do not appear on voters’ list	38
Number of ballots marked in favour of applicant	585
Number of ballots marked against applicant	317
Number of ballots segregated and not counted	47

4499-97-R: Canadian Union of Public Employees (Applicant) v. The City of Toronto (Respondent) v. Etobicoke Professional And Management Employees Association (EPAMEA) and The Ontario Nurses’ Association (Inter-veners)

Unit: “all employees of the City of Toronto, who occupy former City of Etobicoke positions, save and except: (a) Managers, persons above the rank of manager, and persons who exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations; (b) persons occupying positions in the Human Resources Division of the Corporate Services Department; (c) secretaries to Commissioners or the equivalent of Commissioners; (d) persons occupying positions in the office of the Mayor or his designate, persons who may be employed for the exclusive use of City Council and/or its Committees and their respective members; (e) persons regularly employed for less than 24 hours per week; (f) students employed during a school vacation period; (g) any person or persons for whom a trade union held bargaining rights on the date of the application” (309 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	558
Number of persons who cast ballots	316
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	199
Number of segregated ballots cast by persons whose names appear on voter’s list	104
Number of segregated ballots cast by persons whose names do not appear on voters’ list	13
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	156
Number of ballots marked against applicant	40
Number of ballots segregated and not counted	417

4637-97-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. I.K.O. Industries (Madoc) Ltd. (Respondent)

Unit: "all employees of I.K.O. Industries (Madoc) Ltd. in the Township of Madoc, save and except forepersons, persons above the rank of foreperson, office, sales and clerical staff" (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	64
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	57
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	4

4829-97-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Handi-Transit Windsor (Respondent)

Unit: "all employees of Handi-Transit Windsor in the City of Windsor, save and except Managers, persons above the rank of Manager and persons covered by a subsisting collective agreement" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	8
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

4843-97-R: Ontario Public Service Employees Union (Applicant) v. West Parry Sound Health Centre c.o.b. as Jordan Ambulance Service Ltd. (Respondent)

Unit: "all ambulance attendants employed by West Parry Sound Health Centre c.o.b. as Jordan Ambulance Services Ltd. working at or out of the Village of Mactier, save and except supervisors and persons above the rank of supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1

4925-97-R: Service Employees International Union - Local 532 - Affiliated with S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Visiting Homemakers Association of Hamilton-Wentworth (Respondent)

Unit: "all employees of The Visiting Homemakers Association of Hamilton-Wentworth in the Regional Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (500 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	500
Number of persons who cast ballots	325
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	323
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	218

Number of ballots marked against applicant	105
Number of ballots segregated and not counted	2

4969-97-R: United Steelworkers of America (Applicant) v. Bradson Toronto Inc. (Respondent)

Unit: “all employees of Bradson Toronto Inc. in the City of Toronto involved in call centre operations with the Canada Ontario Business Call Centre (“COBCC”) save and except call centre Team Leader, persons above the rank of call centre Team Leader” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	14
Number of persons who cast ballots	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1

4976-97-R: Canadian Union of Public Employees (Applicant) v. Brock University (Respondent)

Unit: “all employees of Brock University employed as Course Coordinators, Instructors, Seminar Leaders, Teaching Assistants, Demonstrators, and Marker/Graders, save and except persons employed as Instructors, Program Co-Ordinators and On-Site Facilitators in the Faculty of Education, and all other persons employed in an on-going capacity whose positions are primarily clerical, technical, administrative or professional and who may teach, coordinate, advise or demonstrate as an integral part of that position and persons for whom a trade union held bargaining rights on April 1, 1998” (561 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	561
Number of persons who cast ballots	169
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	157
Number of segregated ballots cast by persons whose names appear on voter’s list	7
Number of segregated ballots cast by persons whose names do not appear on voters’ list	5
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	106
Number of ballots marked against applicant	52
Number of ballots segregated and not counted	8

5039-97-R: Ontario Public Service Employees Union (Applicant) v. Pavilion Family Resource Centre (Respondent)

Unit: “all employees of Pavilion Family Resource Centre in the District of Timiskaming, save and except supervisors, persons above the rank of supervisor, and school base services workers” (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	14
Number of persons who cast ballots	13
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots segregated and not counted	2

0029-98-R: United Steelworkers of America (Applicant) v. Unalloy-IWRC, A Division of Samuel Manu-Tech Inc. (Respondent)

Unit: “all employees of Unalloy-IWRC, A Division of Samuel Manu-Tech Inc. in the City of Brampton, save and except Assistant Plant Manager and persons above the rank of Assistant Plant Manager, office, clerical and sales staff” (20 employees in unit)

Number of names of persons on revised voters’ list	22
Number of persons who cast ballots	21

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

0076-98-R: Teamsters Local Union No. 879 (Applicant) v. WMI Waste Management of Halton/Hamilton/Niagara Inc. (Respondent)

Unit: "all employees of WMI Waste Management of Halton/Hamilton/Niagara Inc. in the Regional Municipality of Hamilton-Wentworth and the Regional Municipality of Niagara, save and except Managers and Supervisors and persons above the rank of Manager and Supervisor, and office and clerical employees" (39 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	38
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	15

0150-98-R: International Association of Machinists and Aerospace Workers (Applicant) v. NFC Canada Ltd. dba Exel Logistics (Respondent)

Unit: "all employees of NFC Canada Ltd. dba Exel Logistics working at 6700 Northwest Drive in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office workers, sales personnel and persons employed through a temporary worker agency" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	3

0151-98-R: Canadian Union of Public Employees (Applicant) v. Native Leasing Services ("NLS") (Respondent)

Unit: "all employees of Native Leasing Services working at Anduhyaun Inc. in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	2

0158-98-R: Toronto Civic Employees Union, Local 416 - Canadian Union of Public Employees (Applicant) v. Toronto Public Library Board (Respondent)

Unit: "all employees of the Toronto Public Library Board in its Etobicoke Division, save and except managers and persons above the rank of manager, security guards and students employed as pages" (259 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	259
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Number of persons who cast ballots	168
Number of ballots marked in favour of applicant	137
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	16

0183-98-R: Service Employees Union, Local 183 (Applicant) v. Campbell Monument Company Limited (Respondent)

Unit: "all employees of Campbell Monument Company Limited in the City of Quinte West, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

0198-98-R: International Brotherhood of Electrical Workers Construction Council of Ontario (Applicant) v. Garrcorp Industries Inc. c.o.b. as Garrow Electric (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Garrcorp Industries Inc. c.o.b. as Garrow Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Garrcorp Industries Inc. c.o.b. as Garrow Electric in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

0232-98-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Rose Mechanical Limited (Respondent)

Unit: "International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers in respect of all boilermakers and boilermakers' apprentices in the employ of Rose Mechanical Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers' apprentices in the employ of Rose Mechanical Limited in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of persons who cast ballots	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	4

0250-98-R: Ontario Public Service Employees Union (Applicant) v. Cedarwood Gardens Retirement Home (Respondent)

Unit: "all employees of Cedarwood Gardens Retirement Home in the Town of Simcoe, Regional Municipality of Halldimand-Norfolk, save and except supervisors, and persons above the rank of supervisor" (12 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	10

0269-98-R: Service Employees International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Royal Victoria Hospital of Barrie (Respondent)

Unit: "all employees of The Royal Victoria Hospital of Barrie employed at its Detoxification Centre in the City of Barrie located in the County of Simcoe, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, registered, non-registered and student paramedical and technical personnel, persons covered by existing collective agreements, and office and clerical staff" (20 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	4

0301-98-R: United Food and Commercial Workers International Union (Applicant) v. Encore Printing - Division of Triko Printing Inc. (Respondent)

Unit: "all employees of Encore Printing in the City of Kitchener, save and except for supervisors and persons above the rank of supervisor" (3 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3

0306-98-R: Canadian Union of Public Employees (Applicant) v. Community Care Access Centre of Peel (Respondent)

Unit: "all employees of the Community Care Access Centre of Peel, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary, and any person for whom a trade union held bargaining rights on the date of Application" (3 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	27

0342-98-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of North Stormont (Respondent)

Unit: "all employees of the Corporation of the Township of North Stormont, save and except superintendent, persons above the rank of superintendent, office and clerical employees and any person for whom any trade union held bargaining rights as of the date of the application" (10 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	2

0345-98-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Adcom Inc. (Respondent)

Unit: "all employees of Adcom Inc. employed at 940 Belfast Road in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, and office and sales employees" (22 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	25
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	9

0353-98-R: United Steelworkers of America (Applicant) v. Hamilton Natural Gas Centre Ltd. c.o.b. as Keane's Appliances & Fireplaces (Respondent)

Unit: "all employees of Hamilton Natural Gas Centre Ltd. c.o.b. as Keane's Appliances & Fireplaces at 754 Wharncliffe Road South in the City of London, save and except General Manager and persons above the rank of General Manager and office and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	11

0354-98-R: Union of Needletrades, Industrial and Textile Employees Ontario District Council (Applicant) v. Kennson Bindery Services Ltd. (Respondent)

Unit: "all employees of Kennson Bindery Services Ltd. in the Town of Markham, save and except Supervisor, persons above the rank of Supervisor, office, clerical, and sales staff" (115 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	132
Number of persons who cast ballots	128
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	118
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	91
Number of ballots marked against applicant	28
Number of ballots segregated and not counted	8

0355-98-R: United Steelworkers of America (Applicant) v. Philip Enterprises Inc. (Respondent)

Unit: "all employees of Philip Enterprises Inc. at 651 Burlington Street in the City of Hamilton and 411 Glendale Avenue in the city of St. Catharines save and except supervisors, and persons above the rank of supervisor, office, sales and clerical staff, and dispatchers" (150 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	122
Number of persons who cast ballots	118
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	115
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	53
Number of ballots segregated and not counted	3

0356-98-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 (Applicant) v. The Corporation of the Township of Gosfield North (Respondent)

Unit: "all employees of The Corporation of the Township of Gosfield North in the Township of Gosfield North, save and except non-working superintendents, those above the rank of working superintendent, office and clerical staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

0372-98-R: Toronto Civic Employees' Union, Local 416 - Canadian Union of Public Employees (Applicant) v. Toronto Public Library Board (Respondent)

Unit: "all employees of the Toronto Public Library Board in its York Division in the City of Toronto, save and except managers and persons above the rank of manager" (73 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	117
Number of persons who cast ballots	65
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	56
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	4

0401-98-R: Teamsters Local Union No. 879 (Applicant) v. Lakeshore Inc. c.o.b. as Floralake (Respondent)

Unit: "all employees of Lakeshore Inc. c.o.b. as Floralake in the City of St. Catharines, Ontario, save and except sales, office, clerical, supervisors, those above the rank of supervisor and agency workers" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	79
Number of persons who cast ballots	86
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of segregated ballots cast by persons whose names do not appear on voters' list	18
Number of ballots marked in favour of applicant	67
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	4

0412-98-R: United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Applicant) v. Dinnerex National I Limited (Respondent)

Unit: “all employees of Dinnerex National I Limited employed as serving staff, bus persons, kitchen staff, cashiers and students at its Swiss Chalet Restaurant at 50 Market Drive, in the Town of Milton, save and except assistant dining room managers and persons above the rank of assistant dining room manager” (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	15

0446-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of Hurley Corporation engaged in cleaning and maintenance at 95 Wellington Avenue West, in the City of Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	5
Number of ballots segregated and not counted	1

0486-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. Clane Restoration Limited (Respondent)

Unit: “all construction labourers in the employ of Clane Restoration Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Clane Restoration Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (24 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

0502-98-R: Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Magine Inc. (Respondent)

Unit: “all truck drivers in the employ of Magine Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all truck drivers in the employ of Magine Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	6

0512-98-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. Community Lifecare Inc., c.o.b. Community Nursing Home Port Hope (Respondent) v. United Food & Commercial Workers International Union, Local 175 (Intervener)

Unit: "all employees, full-time and part-time, of Community Lifecare Inc. in the Town of Port Hope, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, students employed during the school vacation period and employees employed at Port Hope Villa, 65 Ward Street, Port Hope" (62 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	52
Number of ballots marked in favour of applicant	45
Number of ballots marked in favour of intervener	7

0513-98-R: Ontario Nurses' Association (Applicant) v. Community Care Access Centre of Halton (Respondent)

Unit: "all office and clerical employees employed by the Community Care Access Centre of Halton in the Region of Halton, save and except the secretary to the C.E.O., Programs Supervisor, Information Systems Supervisor, Accounting Supervisor and any person for whom a trade union held bargaining rights as of May 6, 1998" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	3

Applications for Certification Dismissed Without Vote

0227-98-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. C.I.F. Furniture Limited (Respondent)

0554-98-R: Ontario Nurses' Association (Applicant) v. North York General Hospital, Branson Site (Respondent)

Applications for Certification Dismissed Subsequent to Vote

2843-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. D. G. Pratt Construction Limited c.o.b. as Pratt Homes (Respondent)

Unit: "all construction labourers in the employ of D. G. Pratt Construction Limited c.o.b. as Pratt Homes in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (26 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	4

Number of ballots marked against applicant	7
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3712-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1214249 Ontario Inc. O/A G.H. Capital (Respondent)

Unit: "all employees of 1214249 Ontario Inc. O/A G.H. Capital employed at 50, 100, 150, and 185 Graydon Hall Drive, and at 291 and 1436-1494 Avenue Road in the City of Toronto, save and except non-working supervisors, persons above the rank of non-working supervisor, office, sales and clerical staff" (42 employees in unit)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	18

0087-98-R: Canadian Union of Public Employees (Applicant) v. Queen's University (Respondent)

Unit: "all persons registered as students at and who are employed by Queen's University as Instructors, Teaching Assistants, Demonstrators and Markers/Graders" (1022 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	1022
Number of persons who cast ballots	702
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	531
Number of segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names do not appear on voters' list	122
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	223
Number of ballots marked against applicant	374
Number of ballots segregated and not counted	151

0115-98-R: Union of Needletrades, Industrial and Textile Employees Ontario District Council (Applicant) v. Indigo Books and Music Inc. (Respondent)

Unit: "all employees of Indigo Books & Music Inc. at 2300 Yonge Street, Toronto, Ontario, save and except supervisors and persons above the rank of supervisor." (97 employees in unit)

Number of names of persons on revised voters' list	98
Number of persons who cast ballots	81
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	72
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	39
Number of ballots segregated and not counted	9

0172-98-R: IWA Canada Local 2693 (Applicant) v. Long Lake Forest Products Inc. (Respondent) v. Long Lake Employees Association (Intervener)

Unit: "all employees of Long Lake Forest Products employed at the Longlac Sawmill, save and except supervisors and persons above the rank of supervisor, and office and clerical staff" (125 employees in unit)

Number of names of persons on revised voters' list	125
Number of persons who cast ballots	104
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	104
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	79

0202-98-R: International Union United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (UAW) (Applicant) v. Gus Revenberg Pontiac Buick GMC Ltd. and Revenberg Motors Ltd., operating as Saturn, Saab, Isuzu of Windsor (Respondent)

Unit: "all employees of Gus Revenberg Pontiac Buick GMC Ltd. and Revenberg Motors Ltd. in the City of Windsor, Ontario, save and except supervisors and anyone above the position of supervisor, clerical, office staff, and sales staff" (50 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	6

0212-98-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (Caw-Canada) (Applicant) v. P.S.C. Moulding Corporation (Respondent)

Unit: "all employees of P.S.C. Moulding Corp., in the Town of Ajax, save and except supervisors, those above the rank of supervisor, office and clerical staff, and sales staff" (22 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	13

0218-98-R: International Union of Operating Engineers - Local 865 (Applicant) v. Sterling Pulp Chemicals Ltd. (Respondent)

Unit: "all employees performing the operation and maintenance of the plant save and except the Plant Manager, Production Manager, Process Engineer, Purchasing Manager, Commercial Manager, Lab Technician and Plant Secretary" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	12

0265-98-R: United Steelworkers of America (Applicant) v. Hudson's Bay Company (Respondent)

Unit: "all employees of The Bay in the city of Kitchener regularly employed for not more than twenty-four hours per week, save and except Department supervisors, Management Trainees, Office and Clerical Staff. Also Employees covered by an existing Collective Agreement as of April 21st, 1998" (163 employees in unit)

Number of names of persons on revised voters' list	159
Number of persons who cast ballots	134
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	121
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	76

Number of ballots segregated and not counted	13
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0267-98-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Adomako & Associates, Inc. (Respondent)

Unit: "all employees of Adomako & Associates in the Town of Tilbury save and except Owner-Manager and those above the rank of Owner-Manager and office employees" (7 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

0302-98-R: United Steelworkers of America (Applicant) v. Richards-Wilcox Canada Inc. (Respondent)

Unit: "all employees of Richards-Wilcox Canada Inc. in the City of Mississauga, save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff" (27 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose do not appear on voters' list	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	3

0316-98-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Schiffenhaus Canada Inc. (Respondent)

Unit: "all employees of Schiffenhaus Canada Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff," (34 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	21
Number of ballots segregated and not counted	3

0376-98-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. St. Michael's Hospital (Respondent)

Unit: "all employees of St. Michael's Hospital in Metropolitan Toronto, save and except secretary to the President and C.E.O., secretary to the Assistant Administrator, secretary to the Director of Nursing, secretary to the Director of Finance, Personnel Assistant, Medical Staff secretary, Payroll Assistant, Technical and Professional Staff, Supervisors, persons above the rank of supervisor, person employed for less than twenty-four hours per week and those employees covered by any existing Collective Agreement or bargaining rights held by any trade union" (110 employees in unit)

Number of names of persons on revised voters' list	314
Number of persons who cast ballots	256
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	182
Number of segregated ballots cast by persons whose names appear on voter's list	64

Number of segregated ballots cast by persons whose names do not appear on voters' list	10
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	141
Number of ballots segregated and not counted	73

0391-98-R: Canadian Union of Public Employees (Applicant) v. Waste Recycling (Ottawa/Hull) Inc. (Respondent)

Unit: "all employees of Waste Recycling Incorporated, save and except Managers, and persons above the rank of Manager" (46 employees in unit)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	20

0468-98-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. O.K. Economy (Extra Foods) a Division of Westfair Foods Ltd., Marathon ON (Respondent) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Intervener)

Unit: "all employees employed by Westfair Food Ltd., in or in connection with it's O.K. Economy (Extra Foods) store location in the Town of Marathon, save and except the Store Manager and the Assistant Store Manager and persons above the rank of Assistant Store Manager" (31 employees in unit)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	10
Number of ballots segregated and not counted	0

0509-98-R: United Steelworkers of America (Applicant) v. Central Wire Industries Ltd. (Respondent)

Unit: "all employees of Central Wire Industries Ltd. in the County of Lanark, save and except forepersons, and persons above the rank of foreperson, office, technical and sales staff" (82 employees in unit)

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	85
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	79
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	64
Number of ballots segregated and not counted	6

Applications for Certification Withdrawn

2090-97-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Beam Electric Co. Limited (Respondent)

4083-97-R: Labourers' International Union of North America, Local 183 (Applicant) v Drake and Associates (Respondent) (*Terminated*)

4335-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Keewatin-Patricia District School Board (Respondent) v. The Office and Professional Employees International Union and its Local 109 (Intervener)

4872-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sky Cast Inc. (Respondent)

0082-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tor-Bel Developments Inc./Tor-Bel Developments (Respondent)

0419-98-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Construction Del-Nor Inc. (Respondent)

0510-98-R: Laundry & Linen Drivers and Industrial Workers Union, Local 847 affiliated with International Brotherhood of Teamsters, AFL-CIO Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Future Focus Health Systems, Ltd. (Respondent)

EMPLOYEE BARGAINING AGENCY CERTIFICATION

3519-97-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Terrazzo, Tile and Marble Guild of Ontario Inc. and International Union of Bricklayers and Allied Craftsmen (Respondents) v. Locals 6, 7 and 25 (Interveners) (*Granted*)

3520-97-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Masonry Industry Employers' Council of Ontario and International Union of Bricklayers and Allied Craftsmen (Respondents) v. Locals 6, 7 and 25 (Interveners) (*Granted*)

FIRST AGREEMENT - DIRECTION

4352-97-FC: Ontario Nurses' Association (Applicant) v. Comcare (Canada) Limited (Respondent) (*Granted*)

4758-97-FC: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 affiliated with the Hotel Employees Restaurant Employees International Union (Applicant) v. PW Hotel Services Limited c.o.b as Prince of Wales Hotel (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2337-96-R: United Steelworkers of America (Applicant) v. Hudson's Bay Company and Zellers Inc. (Respondents) v. United Food and Commercial Workers International Union, Local 530W (Intervener) (*Withdrawn*)

1010-97-R: Construction Workers Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. Penn Mechanical Ltd./Group 92 Mechanical Inc. (Respondents) v. The Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Intervener) (*Withdrawn*)

1033-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stealth Contracting Inc. (Respondent) (*Endorsed Settlement*)

1306-97-R: London & District Service Workers' Union, Local 220 (Applicant) v. Sarnia General Hospital and St. Joseph's Health Centre (Respondents) v. Office and Professional Employees International Union, Local 347, Ontario Public Service Employees Union (Interveners) (*Dismissed*)

2099-97-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen

and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 508 (Applicants) v. JFT Mechanical Ltd., John F. Thompson, c.o.b. JFT Mechanical, and Cameco Corporation (Respondents) (*Withdrawn*)

2404-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (Caw-Canada) (Applicant) v. Con Cast Pipe and Sky Cast Inc. (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener) (*Granted*)

2596-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Spring Plastering Limited and VN Drywall Systems Inc. (Respondents) (*Granted*)

2720-97-R: Ontario Pipe Trades Council (Applicant) v. Canber Contracting Inc., Canber Electric Inc. and Bermis Inc. (Respondents) (*Endorsed Settlement*)

3207-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 824117 Ontario Ltd. (Operating as Strong Carpets Flooring), Strong Carpets and Flooring Interiors Inc., The Kal Group (Respondents) (*Granted*)

3558-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Gibraltar Building Corp. Ltd., Harrowston Developments Corporation First City Trust Company c.o.b. as Archway Homes, 585753 Ontario Limited c.o.b. as New Age Homes (Respondents) (*Withdrawn*)

4298-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Richmond Electric Services Ltd. and X-Press Electric Services Ltd. (Respondents) (*Endorsed Settlement*)

4312-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Leader Tile Terrazzo Inc. and A.T.M. Tile Inc. (Respondents) (*Endorsed Settlement*)

4369-97-R: Ontario Council of the International Brotherhood of Painters & Allied Trades, and the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Galatia Construction Ltd., N.K.P. Painting Contractors (1981) Limited, N.K.P. Painting Inc., and Konos Construction Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1010-97-R: Construction Workers Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. Penn Mechanical Ltd./Group 92 Mechanical Inc. (Respondents) v. The Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Intervener) (*Withdrawn*)

1033-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stealth Contracting Inc. (Respondent) (*Endorsed Settlement*)

1306-97-R: London & District Service Workers' Union, Local 220 (Applicant) v. Sarnia General Hospital and St. Joseph's Health Centre (Respondents) v. Office and Professional Employees International Union, Local 347, Ontario Public Service Employees Union (Interveners) (*Dismissed*)

1532-97-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. M.H.E. Contracting Limited, Demag Material Handling Limited, Mannesmann (Canada) Ltd., Rapistan Canada Limited, Rapistan Systems Limited, Rapistan Demag Limited (Respondents) v. Millwright District Council of Ontario, United Steelworkers of America (Interveners) (*Withdrawn*)

2596-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Spring Plastering Limited and VN Drywall Systems Inc. (Respondents) (*Granted*)

2720-97-R: Ontario Pipe Trades Council (Applicant) v. Canber Contracting Inc., Canber Electric Inc. and Bermis Inc. (Respondents) (*Endorsed Settlement*)

2807-97-R; 0071-98-R: Ontario Public Service Employees Union (Applicant) v. Canadian Union of Public Employees and its Local 1974 and The Religious Hospitallers of St. Joseph of the Hotel Dieu of Kingston (Respondent); Ontario Public Service Employees Union (Applicant) v. Kingston General Hospital and Canadian Union of Public Employees and its Local 1974, Canadian Union of Public Employees, Local 1974 (Respondents) v. The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston (Intervener) (*Endorsed Settlement*)

3207-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 824117 Ontario Ltd. (Operating as Strong Carpets Flooring), Strong Carpets and Flooring Interiors Inc., The Kal Group (Respondents) (*Granted*)

3558-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Gibraltar Building Corp. Ltd., Harrowston Developments Corporation First City Trust Company c.o.b. as Archway Homes, 585753 Ontario Limited c.o.b. as New Age Homes (Respondents) (*Withdrawn*)

4298-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Richmond Electric Services Ltd. and X-Press Electric Services Ltd. (Respondents) (*Endorsed Settlement*)

4312-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Leader Tile Terrazzo Inc. and A.T.M. Tile Inc. (Respondents) (*Endorsed Settlement*)

4369-97-R: Ontario Council of the International Brotherhood of Painters & Allied Trades, and the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Galatia Construction Ltd., N.K.P. Painting Contractors (1981) Limited, N.K.P. Painting Inc. and Konos Construction Ltd. (Respondents) (*Withdrawn*)

4762-97-R: Kingston, Frontenac, Lennox & Addington Health Unit (Applicant) v. Canadian Union of Public Employees, Local 3175 and Kingston Frontenac, Lennox & Addington Community Care Access Centre (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2947-96-R: Brad Taylor (Applicant) v. Laundry, Linen Drivers and Industrial Workers Union Local 847 (Respondent) v. Work Wear Corporation of Canada, Ltd. A Subsidiary of G & K Services Inc. (G & K Work Wear)

Unit: "Bargaining Unit #1 All linen supply route men and laundry drivers of Work Wear employed at Metro West, in the City of Etobicoke, save and except salesmen, supervisors and persons above the rank of supervisor (*Granted*). Bargaining Unit #2 All linen supply route men and laundry drivers of Work Wear employed at Metro East, in the City of Scarborough, save and except salesmen, supervisors and persons above the rank of supervisor (*Granted*). Bargaining Unit #3 All linen supply route men and laundry drivers of Work Wear employed at Hamilton, save and except salesmen, supervisors and persons above the rank of supervisor (*Dismissed*). Bargaining Unit #4 All linen supply route men and laundry drivers of Work Wear employed at Cambridge, save and except salesmen, supervisors and persons above the rank of supervisor (*Granted*)." (160 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	24
Number of ballots segregated and not counted	3

4651-97-R: Joe Downey on behalf of the International Union of Bricklayers and Allied Craftsmen, Local 12, employed by Twin City Tile Company Limited (Applicant) v. International Union of Bricklayers and Allied Craftsmen, Local 12 and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Respondent) v. Twin City Tile Company Limited (Intervener)

Unit: "all Marble, Tile & Terrazzo, Cement Masons and Resilient Floor Layers and their Helpers, their respective Apprentices, Improvers and Working Foremen ... in the Province of Ontario" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

4693-97-R: Brian Hicks (Applicant) v. The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades and Glaziers and Metal Mechanics, Local 1795 (Respondent) v. The Glass House (Intervener)

Unit: "all hourly employees in the employ of The Glass House carrying out non ICI work, save and except management personnel, office and sales staff, guards, supervisors and those above the rank of supervisor" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1
Number of ballots segregated and not counted	0

4851-97-R: Tom Burchill, on his own behalf and on behalf of a group of employees of Airgo Mechanical (Applicant) v. Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562 (Respondent) v. Airgo Mechanical Inc. (Intervener)

Unit: "all certified journeymen sheet metal workers or registered apprentices, as well as sheeter/deckers, welders, sheeter's assistants, material handlers and probationary employees in the ICI sector of the construction industry" (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

4886-97-R: A Group of Sheet Metal Employees of B.G.D. Roofing Company Ltd. (Applicant) v. Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers' International Association, Local 562 (Respondent) v. B.G.D. Roofing Company Ltd. (Intervener)

Unit: "all of the employees of BGD Roofing Company Ltd. performing work covered by the terms and conditions of the Agreement in the Cities of Kitchener-Waterloo, Guelph, Cambridge, the Counties of Waterloo, Wellington, Grey, Perth; excluding the Townships of Blanchard, Downie, Fullerton, Hibbert and Logan Townships, including all the municipalities in the Counties or portion thereof. "Employee" means a certified journeyman sheet metal worker or registered apprentice, as well as sheeter/decker, welder, sheeter's assistant, material handler and probationary employee engaged in the sheeting and decking segment of the sheet metal industry, recognized by the local union and employed in the shop or on the job site except as otherwise specifically provided in the Collective Agreement" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked against respondent	2

4891-97-R: A Group of Roofing Employees of BGD Roofing Company Ltd. (Applicant) v. Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 562 (Respondent) v. B.G.D. Roofing Company Ltd. (Intervener)

Unit: "all of the employees of BGD Roofing Company Ltd. performing work covered by the terms and conditions of the Agreement in the commercial, industrial and institutional sectors and new high rise structures in all other sectors, except the work covered in the collective agreement of the Electrical Power Systems Construction Association and the Union of the construction industry, in the following geographic areas in the Province of Ontario: Kitchener, Ontario (including the Counties of Waterloo, Wellington, Grey and Perth with the exception of Blanchard, Downie, Fullerton, Hibbert and Logan Townships including all the municipalities contained therein). "Employee" means a journeyman, roofer or assistant roofer or other roofing personnel recognized by the Union and employed by an employer" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

4960-97-R: Peppino Falvo (Applicant) v. International Brotherhood of Electrical Workers, Local Union 353 and all other affiliated bargaining agents of the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (Respondent) v. Rexdale Electrical Contractors Ltd. (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of Rexdale Electrical Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

0026-98-R: Matthias Dierstein (Applicant) v. IBEW Construction Council of Ontario - Local Union 804 (Respondent) v. Del-Co Electrical Inc. (Intervener)

Unit: "as alleged by the Union: the inside and outside jurisdictions as outlined in the constitution of the IBEW and the performance of all electrical work performed within the geographic location of the Union as hereinafter defined: Local 804 - Central Ontario (Kitchener) - Counties of Bruce, Dufferin, Perth, Waterloo, Wellington and Halton North of 401 Highway" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked against respondent	2

0075-98-R: Rob Iacoboni (Applicant) v. Warehousemen, Transportation and General Workers Union, Local 715 of the Retail, Wholesale and Department Store Union, A.F.L., C.L.O., C.L.C. (Respondent) v. Northern Uniform Service Corp. (Intervener)

Unit: "all employees of Northern Uniform Service Corp. in the Regional Municipality of Sudbury, save and except foremen and persons above the rank of foreman, and office and clerical staff." (30 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of ballots marked in favour of respondent	20
Number of ballots marked against respondent	9

0105-98-R: Jo-Anne Shaw (Applicant) v. Retail, Wholesale/Canada Canadian Services Sector Division of the United Steelworkers of America, Local 414 (Respondent) v. 710044 Ontario Ltd. c.o.b. as Tara Natural Foods (Intervener)

Unit: "all employees of 710044 Ontario Ltd. c.o.b. as Tara Natural Foods, in the City of Kingston, save and except Managers, persons above the rank of Manager, and office and clerical staff." (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5

0109-98-R: Fernando Fresco (Applicant) v. The International Brotherhood of Painters and Allied Trades and Glaziers and Metal Mechanics, Local 1795 (Respondent) v. Downtown Glass & Mirror Limited o/a Campbell Glass & Mirror (Intervener)

Unit: "all employees of Campbell Glass Limited at Hamilton, save and except foremen, persons above the rank of foreman, and office staff" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked against respondent	2

0116-98-R: Mark Malone (Applicant) v. United Food & Commercial Workers International Union, Local 175 & 633 (Respondent) (*Dismissed*)

0180-98-R: John Cordeiro (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 249 (Respondent) v. Cupido Construction (1989) Limited (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of Cupido Construction (1989) Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen" (17 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	2

0194-98-R: Sergio Chiodo (Applicant) v. I.B.E.W. Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 402 (Respondents) v. Marken Electric Ltd. (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of Marken Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked against respondent	4

0199-98-R: George Marlatt (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America Local 414 (Respondent) v. Jarvis Design and Display Ltd. (Intervener)

Unit: "all employees of the employer in the Township of Oxford-on-Rideau, as certified by the Labour Relations Board, save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff" (30 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	2

0231-98-R: Tim Nahrgang (Applicant) v. Sheet Metal Workers International Association, Local 562, Local 30, Local 392, Local 47, Local 397, Local 235, Local 473, Local 269, Local 504, Local 537, Local 539, The labour Relations Section of the Ontario Industrial Roofing Contractors' Association and The Built-Up Roofers, Damp and Waterproofing Section of the Ontario Sheet Metal Workers' & Roofers' Conference of the Sheet Metal Workers International Association (Respondent) v. Watertight Roofing Services Limited (Intervener)

Unit: "all roofers in the employ of Watertight Roofing Services Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked against respondent	15

0237-98-R: Patricia Scotland (Applicant) v. Retail, Wholesale Canada Canadian Service Sector Division of United Steelworkers of America, Local 1000 (Respondent) v. Wal-Mart Canada Inc. (Intervener) (*Dismissed*)

0244-98-R: Brett Mcfarquhar (Applicant) v. Retail Wholesale Canada The United Steelworkers of America, Local 414 (Respondent) v. Keele St. Bingo Country (Toronto) Inc. (Intervener)

Unit: "all employees of Keele St. Bingo (Toronto) Inc. in the City of Toronto, Ontario, save and except session manager, canteen manager, and persons above the rank of session manager and/or canteen manager." (34 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	14

0309-98-R: Charles Gallagher (Applicant) v. Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference and its affiliated Locals (Respondents) v. Commercial Sheet Metal Inc. (Intervener)

Unit: "all certified journeymen sheet metal workers or registered apprentices, as well as sheeter/deckers, welders, sheeters' assistants, material handlers and probationary employees engaged in the ICI sector of the construction

industry, save and except working non-foremen and persons above the rank of working non-foreman" (0 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked against respondent	1
Number of ballots segregated and not counted	3

0346-98-R: Bruce Archibald (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Respondent) (*Dismissed*)

0403-98-R: Michael Baratta (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1946 (Respondent) v. Bernardo Marble and Tile Limited (Intervener)

Unit: "all journeymen and apprentice carpenters, other than millwrights, employed by Bernardo Marble and Tile Limited engaged in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked against respondent	5

0404-98-R: Elie Khalife, on his own behalf and on behalf of a group of employees of West-Way Taxi Nepean Ltd. (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Respondent) v. Westway Taxi Nepean Ltd. (Intervener) (*Dismissed*)

0417-98-R: Kevin Critch (Applicant) v. Teamsters Local Union 419 (Respondent) v. Domcor (Intervener)

Unit: "all employees working at or out of Mississauga, Ontario, save and except foreman, supervisors, persons above the rank of foreman and supervisor, office and sales staff, and students employed during the vacation period" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked against respondent	3

0421-98-R: Ronald Larrivee (Applicant) v. United Steelworkers of America (Respondent) v. Baycar Steel Fabricating Limited (Intervener)

Unit: "The Company recognizes the Union as the sole and exclusive bargaining agent for all its employees in the Regional Municipality of Sudbury, save and except Supervisors, persons above the rank of Supervisor, office, clerical, technical and sales staff, and students employed during the regular school vacation period" (42 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	19
Number of ballots marked against respondent	22
Number of ballots segregated and not counted	0

0442-98-R: Roy Allan (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council on behalf of all affiliated Local unions, Labourers' International Union of North America, Local 837 (Respondents) (*Withdrawn*)

0465-98-R: A. Pedersen (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent)

Unit: "all employees of the employer at its plant in Apple Hill, Ontario, save and except forepersons, persons above the rank of foreperson, office and clerical staff, and students employed during the school vacation period" (21 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	16

0466-98-R: Employees of Collingwood Nursing Home (Applicant) v. United Food and Commercial Workers (Respondent) (*Dismissed*)

0537-98-R: Staff of North Frontenac Community Services (Applicant) v. Ontario Public Services Employees Union Local 427 (Respondent)

Unit: "all employees of the North Frontenac Community Services Corporation in the County of Frontenac, save and except the Coordinator of Programs and Services, and Child Care Centre Coordinator, persons above the ranks of Coordinator of Programs & Services and Child Care Centre Coordinator, Financial Manager, Executive Assistant and Home Support Volunteers. (Home Support Coordinator, Day Care Support" (26 employees in unit) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1769-96-U: Sandor Furedi (Applicant) v. Construction Workers Local 53, CLAC (Respondent) (*Withdrawn*)

3297-96-U: Ontario Public Service Employees Union and Laurel Damphouse/Ron Matlack, Local 133 (Applicant) v. Ministry of Community and Social Services/Windsor Area Office (Respondent) (*Withdrawn*)

3310-96-U: Ron Boyer (Applicant) v. International Association of Machinists and Aerospace Workers, Local Lodge 2792 and DDM Plastics Inc. (Respondents) (*Dismissed*)

1009-97-U: Construction Workers Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. Penn Mechanical Ltd., and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Respondents) (*Withdrawn*)

1121-97-U: Laundry, Linen Drivers and Industrial Workers Union Local 847 (Applicant) v. Work Wear Corporation of Canada, Ltd. A Subsidiary of G & K Services Inc. (G & K Work Wear) (Respondent) v. Laundry, Linen Drivers and Industrial Workers Union Local 847 (Intervener) (*Withdrawn*)

1156-97-U: Laundry, Linen Drivers and Industrial Workers Union Local 847 (Applicant) v. Brad Taylor and Work Wear Corporation of Canada, Ltd. A Subsidiary of G & K Services Inc. (G & K Work Wear) (Respondents) (*Dismissed*)

1354-97-U: Lonnie J. Nelligan (Applicant) v. U.S.W.A. Local 4752 (Respondent) (*Withdrawn*)

1414-97-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Cy Rheault Construction Ltd. (Respondent) (*Withdrawn*)

1889-97-U: Gary Kotar (Applicant) v. Union of Needletrades, Industrial & Textile Employees (Respondent) v. Owens-Corning Canada Inc., Guelph Glass Plant (Intervener) (*Dismissed*)

1942-97-U: Randolph Adams (Applicant) v. United Plant Guard Workers, Local 1962, (UPGW) (Respondent) v. St. Joseph's Health Center (Intervener) (*Dismissed*)

2100-97-U: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and its Local 508 (Applicant) v. JFT Mechanical Ltd.; John F. Thompson, c.o.b. JFT Mechanical, and Cameco Corporation (Respondents) (*Withdrawn*)

2130-97-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Beam Electric Co. Limited (Respondent) (*Withdrawn*)

2171-97-U: The Cambridge Suites Hotel Limited (Applicant) v. United Food and Commercial Workers Union, Local 351 (Respondent) (*Withdrawn*)

2499-97-U: Christian Labour Association of Canada (CLAC) (Applicant) v. Delta Chi Beta Early Childhood Centre (Windsor) Inc. (Respondent) (*Terminated*)

2825-97-U: Wendy Robinson (Applicant) v. Container Design Services (Respondent) (*Withdrawn*)

2829-97-U: David Helmer (Applicant) v. International Association of Machinists and Aerospace Workers, Lodge 412 (Respondent) v. Ray Bolger Steel Fabrication Ltd. (Intervener) (*Withdrawn*)

2857-97-U: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicant) v. W. Van Erp Masonry Inc., W. Van Erp Masonry Contractor Ltd. and William Van Erp (Respondents) (*Withdrawn*)

3450-97-U: Wet-Dry Staff, Mark Drexler, Tim Spence, Brian Kistner, Jake Dolderman, Betsy Elderkin, Joan Perry and Johanne Sett (Applicant) v. Canadian Union of Public Employees Local 241 and CUPE Ontario (Respondent) (*Withdrawn*)

3529-97-U: Labourers' International Union of North America, Local 183 (Applicant) v. D. G. Pratt Construction Limited c.o.b. as Pratt Homes (Respondent) (*Withdrawn*)

3739-97-U: Damian J. Mills (Applicant) v. United Steelworkers of America Union Local 8694 (Respondent) v. Bertrand Faure Components Limited (Intervener) (*Terminated*)

3782-97-U: United Brotherhood of Carpenters and Joiners of America, Local 1072, Joe Almeida, and Cathy Smith (Applicant) v. United Brotherhood of Carpenters and Joiners of America on their own behalf and as Trustee of United Brotherhood of Carpenters and Joiners of America, Local 1072 (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local 1072 (Intervener) (*Dismissed*)

3799-97-U: Christopher Michael Scott (Applicant) v. International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers and Helpers (Respondent) v. R.J. Cyr Co. Inc. (Intervener) (*Withdrawn*)

3818-97-U: Graphic Communications International Union, Local 500M (Applicant) v. Quebecor Printing Haughton A Division of Quebecor Printing Inc. (Respondent) (*Withdrawn*)

3838-97-U: Gail Cecile (Applicant) v. CAW Local 240 (Respondent) v. Green Shield Canada (Intervener) (*Withdrawn*)

3924-97-U: Bart Van Norden (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario (Management Board Secretariat) (Intervener) (*Withdrawn*)

4073-97-U: Maurice Doyon (Applicant) v. International Brotherhood of Electrical Workers, Local 1788 (Respondent) (*Dismissed*)

4380-97-U: Nick Robulack (Applicant) v. Loblaws Supermarkets Limited, UFCW Canada (Respondents) (*Withdrawn*)

4442-97-U: Wayne S. Brand (Applicant) v. Canadian Union of Public Employees London Civic Employees, Local 107 (Respondent) (*Withdrawn*)

4515-97-U: United Steelworkers of America (Applicant) v. Slotex Inc. (Respondent) (*Withdrawn*)

4522-97-U: Samuel Thomas (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

4589-97-U: Lucie Nadon (Applicant) v. CAW Local 222 (Respondent) (*Withdrawn*)

4594-97-U: Leslie J. Murdoch (Applicant) v. Canadian Union of Public Employees Local 1266, Prescott Russell County Board of Education (Respondents) (*Withdrawn*)

4666-97-U: Brewery, General and Professional Workers' Union (Applicant) v. St. Michael's Hospital (Respondent) (*Withdrawn*)

4667-97-U: Walter Michael Crossan (Applicant) v. The United Food and Commercial Workers and Hanna Baddaoui (Respondents) v. Joe Francis, Sandy Cole (Interveners) (*Withdrawn*)

4676-97-U: Communication, Energy and Paperworkers Union of Canada, Local 1104 - Association of Toronto Secondary School Secretaries (Applicant) v. Toronto District School Board (Respondent) v. Canadian Union of Public Employees, Local 63, Canadian Union of Public Employees, Local 4400, The Ontario Secondary School Teachers' Federation (Interveners) (*Withdrawn*)

4688-97-U: Dolly Rogerson, Darlene Weiler, Cheryl Vollick (Applicant) v. Service Employees Union L. 478 (Respondent) (*Withdrawn*)

4691-97-U: Phyllis Abreu/Lamont (Applicant) v. Ontario Hydro, Power Workers' Union, CUPE Local 1000 - C.L.C. (Respondents) (*Dismissed*)

4713-97-U: Employees of Local 397, CAW Loraina Koopman Heather Rowan Donna Elek (Applicant) v. Sue Hall, Office & Professional Employees' International Union, Local 343 (Respondent) (*Withdrawn*)

4719-97-U: Sarnia Construction Association (Applicant) v. CH Industries Ltd. (Respondent) (*Withdrawn*)

4739-97-U: Peter Ivaskiv (Applicant) v. Association of Canadian Film Craftspeople (ACFC) (Respondent) (*Withdrawn*)

4757-97-U: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 affiliated with the Hotel Employees Restaurant Employees International Union (Applicant) v. PW Hotel Services Limited c.o.b. as Prince of Wales Hotel (Respondent) (*Terminated*)

4854-97-U: Michael Moser (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) (Respondent) v. Lofthouse Brass Ltd. (Intervener) (*Dismissed*)

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July/August 1998



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1998] OLRB REP. JULY/AUGUST

EDITOR: RON LEBI

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also reported in *Canadian Labour Relations Boards
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Collective Agreement - Certification - Ratification and Strike Vote - Termination - Timeliness - Voluntary Recognition - UFCW applying to represent bargaining unit of grocery store employees - USWA asserting existence of collective agreement with employer and that application untimely - Board not accepting USWA submission that its collective agreement with employer was but a continuation of a collective bargaining relationship at another location of the employer and that section 66 of the Act should not therefore apply - Board not satisfied that USWA ratification vote or any of the other circumstances establishing that USWA was entitled to represent employees at the store at the time the agreement was made - Board terminating USWA's bargaining rights under section 66 of the Act, finding UFCW's certification application timely, and referring matter to Manager of Field Services for purposes of determining vote arrangements

LOEB INC.; RE UFCW, LOCAL 175; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE USWA, LOCAL 414 660

Collective Agreement - Certification - Termination - Timeliness - Voluntary Recognition - USWA seeking to represent employees employed at two different retail stores - UFCW claiming pre-existing bargaining rights at the stores through voluntary recognition and asserting that certification applications untimely - UFCW and employer entering into agreement prior to opening of the stores and at time when no employees had yet been hired - Board finding no basis to conclude that UFCW was entitled to represent employees in either bargaining unit at the time that the agreement was entered into - Board terminating UFCW's bargaining rights pursuant to section 66 of the Act - Board permitting UFCW opportunity to make submissions regarding timeliness of USWA applications and why the Board should not take approach suggested by *T.R.S. Food Services* case

MAXI; RE USWA; RE THE UFCW, LOCAL 175..... 675

Collective Agreement - Duty of Fair Representation - Ratification and Strike Vote - Unfair Labour Practice - Employee alleging that union failed to provide adequate notice to employees of ratification vote - Application dismissed

BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE PHYLLIS FOURNIER; RE USWA..... 568

Colleges Collective Bargaining Act - Discharge - Duty of Fair Representation - Evidence - Unfair Labour Practice - Witness - College terminating applicant's contract after three years' employment in bookstore - Union grieving but grievance premised on acceptance of idea that applicant

was contractual employee and not person in bargaining unit - Applicant alleging that union and college breaching Colleges Collective Bargaining Act (CCBA) in various way related to fact that she was treated as contractual employee, rather than as member of bargaining unit - Board finding that union violated its duty of fair representation - Board also finding that college failed to renew applicant's contract in response to her seeking intervention of union and that college maintained bookstore position as contractual, at least in part in order to avoid applicant being able to exercise rights as member of bargaining unit - Board drawing adverse inference from failure of college vice-president to testify regarding actual reasons for employer's non-renewal of applicant's contract - Application alleging that college violated section 75(2) of CCBA allowed

LA CITÉ COLLÉGIALE OTTAWA AND OPSEU; RE MURIELLE WAITO 636

Construction Industry - Arbitration - Construction Industry Grievance - Board exercising its discretion under Bill 31 amendment to *Labour Relations Act* to refuse to accept employer's referral of union's grievance - Board deferring to expedited arbitration procedures found in parties' collective agreement

KENNEDY MASONRY COMPANY LIMITED; RE LIUNA, LOCAL 183, BMIU, LOCAL 1, MASONRY COUNCIL OF UNIONS OF TORONTO AND VICINITY 622

Construction Industry - Certification - Employee - Board concluding that its long-standing approach of applying the *Trades Qualification and Apprenticeship Act* (TQAA) to applications for certification in the construction industry relating to compulsory certified trades applies to applications brought under section 146(3) of the Act - Board also holding that it is incorrect to conclude that someone who does not satisfy the obligations contained in the TQAA may accordingly be characterized as a "construction labourer" - Where an individual who worked for the employer on the certification application date spent a majority of time performing the work of a plumber but was working beyond the scope of the TQAA, that individual would be off the list of employees for purposes of the application

ROLAN PLUMBING, 517739 ONTARIO LTD., C.O.B. AS; RE LIUNA, LOCAL 183; RE UA, LOCAL UNION 46 711

Construction Industry - Construction Industry Grievance - Timeliness - Union grieving lay off and failure to recall three employees and alleging that employer acting arbitrarily - Collective agreement making reference to lay-off in management rights clause, but none at all to recall - Union filing grievance after expiry of time limit set out in collective agreement - Board finding grievance untimely but that employer waived its right to object by taking steps to settle without ever raising any objection or reserving right to do so in future - Board finding that union's grievance regarding lay-off making out prima facie case, but that there is no prima facie case regarding failure to recall

GOTTARDO MASONRY & CONTRACTING LTD.; RE MASONRY COUNCIL OF UNIONS, TORONTO & VICINITY AND BMIU, LOCAL 1 AND LIUNA, LOCAL 183 614

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Timeliness - Employer objecting to consideration of union's grievance by Board on grounds that grievance untimely, that grievance is really a disguised jurisdictional dispute complaint, and the challenge to assignment of work has already been referred by applicant union to Canadian Plan for Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan") - Board finding portion of grievance untimely and striking it out - Board agreeing that the grievance constitutes a jurisdictional dispute and that the dispute had already been referred to the Plan - Board deferring consideration of grievance pending resolution of jurisdictional dispute under the Plan

ONTARIO HYDRO AND EPSCA; RE IBEW, LOCAL UNION 1788; RE PAT DISTRICT COUNCIL NO. 46 690

Construction Industry - Damages - Duty of Fair Referral - Intimidation and Coercion - Remedies - Unfair Labour Practice - Board earlier finding that local union's operation of hiring hall violating duty of fair referral - Board also finding that union violated Act by threatening one applicant with charges if he looked into union's finances and by giving applicants written notice that they were being charged for unspecified violations of constitution - Board concluding that threats were reprisals imposed on applicants for exercise of rights under the Act - Board directing union to take all steps necessary to ensure that operation of hiring hall complies with section 75 of the Act as described in earlier Board decision - Damages for lost wages and pension contributions calculated and ordered - Board also directing union to provide each member with copy of Board notice summarizing outcome of Board proceedings

SMITH, GRAHAM, ALLEN OUELLETTE AND CHARLES WILBURN; RE BSOIW, LOCAL 700.....

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Construction Industry - Employer - Jurisdictional Dispute - Parties - Ironworkers' union and Glaziers' union disputing assignment of certain work in connection with unloading, lifting, handling, aligning, fastening and installation of new windows in punched openings at nursing home in Toronto - Board permitting applicant to amend its description of disputed work to include unloading, handling, rigging and installation of curtain wall at same project - Board granting designated Employer Bargaining Agency and party to ICI agreement with Glaziers' union intervenor status - Parties disputing identity of 'employer' assigning work - Board not accepting submission that general contractor assigning work by way of subcontract - Board applying *Napev Construction* case and finding subcontractor to be employer for purpose of section 99(1)(b) of the Act - Ironworkers' union having no bargaining rights with subcontractor - Board finding that disputed work properly assigned to Glaziers

AGS CONTRACT GLAZING LIMITED, AND PAT, LOCAL 1819, GLAZIERS, PCL CONSTRUCTORS CANADA INC.; RE IRON WORKERS DISTRICT COUNCIL OF ONTARIO AND INTERNATIONAL ASSOCIATION OF BRIDGE STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 721, RE THE ARCHITECTURAL GLASS AND METAL CONTRACTORS ASSOCIATION.....

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Construction Industry - Jurisdictional Dispute - Carpenters' union and Labourers' union disputing assignment of tending work associated with erection and dismantling of scaffolding - Board holding that general tending work is *prima facie* in work jurisdiction of construction labourer, that all other tending work is within work jurisdiction of carpenter, that general tending work should be assigned to one or more construction labourers (unless there is insufficient general tending work required to keep a construction labourer occupied for a minimum of 4 hours in a working day) - Board also holding that an additional construction labourer must be assigned to perform general tending work when there is sufficient such work to keep the first labourer fully occupied for a full working day and there is additional work to fully occupy another labourer for an additional four hours - Board concluding that employer is free to assign additional construction labourers to perform general tending work as appropriate and that fact that amount of general tending work available is less than 4 hours worth of work does not mean that that work is within Carpenters' work jurisdiction

DOUG CHALMERS CONSTRUCTION LIMITED ("CHALMERS") AND LIUNA, LOCAL 1089 ("LABOURERS"); RE CJA, LOCAL 1256 ("CARPENTERS").....

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Construction Industry - Jurisdictional Dispute - Sector Determination - Labourers' union and Carpenters' union disputing assignment of work in connection with concrete for base slab and containment walls built in connection with salvage and replacement of high concentration glycol storage tanks - Carpenters' union bargaining rights with employer restricted to ICI sector of construction industry - Board concluding that disputed work falling outside ICI sector and accordingly that work properly assigned to members of Labourers

DUFFERIN CONSTRUCTION CO. AND CJA, LOCAL 18; RE LIUNA, LOCAL 837

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Construction Industry - Jurisdictional Dispute - Millwrights' union and Ironworkers' union disputing assignment of certain work described as removal and rigging of worn chain clips, pins and chains, and the rigging, installation and welding of new chain clips, pins and chains at paper mill lime kiln in Board Area 22 - Board holding that work was properly assigned to 50-50 composite crew of ironworkers and millwrights - Employer directed to assign this work on 50-50 composite crew basis in Board Areas 22, 23, 24 and 25	
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PHOENIX RESTORATION, A DIVISION OF PHOENIX GUNITE SERVICES LIMITED AND OPCM AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL 598; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 10	707
Construction Industry - Unfair Labour Practice - OPC and others alleging that International union violating Bill 80 provisions of the Act concerning administration of employment benefit plans - Board finding that the relevant trust document creates separate Canadian and American pension plans, and that the Canadian Plan is an employment benefit plan governed by section 150 of the Act - Board finding and declaring that International union violating section 150 by refusing to recognize right of local unions to appoint trustees to the Canadian Plan - Board declining to inquire into allegation that International union violating section 149 of the Act by interfering with local trade union without just cause - Board exercising discretion against inquiring into section 149 allegation because it would not issue remedy other than declaration and because ruling on the section 149 application would not be conducive to good labour relations	
ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, THE; JERRY COELHO, AND TOM OLDHAM; BAC, LOCAL 1 AND KERRY WILSON, BAC, LOCAL 2 AND DANILO BUTTAZZONI; BAC, LOCAL 5 AND JOHN HAGGIS; RE BAC, JOHN T. JOYCE, JOHN J. FLYNN, FRANK STUPAR, JAMES BOWLAND AND MICHAEL CARLANDER AND BAC, LOCAL UNION OFFICERS AND EMPLOYEES PENSION PLAN OF CANADA.....	695
Construction Industry Grievance - Arbitration - Construction Industry - Board exercising its discretion under Bill 31 amendment to <i>Labour Relations Act</i> to refuse to accept employer's referral of union's grievance - Board deferring to expedited arbitration procedures found in parties' collective agreement	
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ONTARIO HYDRO AND EPSCA; RE IBEW, LOCAL UNION 1788; RE PAT DISTRICT COUNCIL NO. 46.....

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Crown Employees Collective Bargaining Act - Essential Services - Health and Safety - OPSEU and Management Board asking Board to determine several issues arising from essential service bargaining conducted pursuant to *Crown Employees Collective Bargaining Act* - Board concluding that it is not open to the Board to order the employer not to use replacement workers in the event of a work stoppage, nor to direct that that determination should guide the parties in their negotiation of an essential services agreement - Board directing parties to negotiate terms and conditions of essential and emergency service workers who may be required to work in the event of a work stoppage - Board directing parties to negotiate as part of essential service agreement a protocol to ensure that a designated bargaining unit essential service worker who is unable to attend at work can be replaced by another bargaining unit worker - Board directing parties to bargain as part of essential service agreement a protocol for those situations where a designated essential service worker exercises the right to refuse unsafe work under *Occupational Health and Safety Act*

CROWN IN RIGHT OF ONTARIO, THE (AS REPRESENTED BY MANAGEMENT BOARD SECRETARIAT); RE OPSEU.....

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Damages - Construction Industry - Duty of Fair Referral - Intimidation and Coercion - Remedies - Unfair Labour Practice - Board earlier finding that local union's operation of hiring hall violating duty of fair referral - Board also finding that union violated Act by threatening one applicant with charges if he looked into union's finances and by giving applicants written notice that they were being charged for unspecified violations of constitution - Board concluding that threats were reprisals imposed on applicants for exercise of rights under the Act - Board directing union to take all steps necessary to ensure that operation of hiring hall complies with section 75 of the Act as described in earlier Board decision - Damages for lost wages and pension contributions calculated and ordered - Board also directing union to provide each member with copy of Board notice summarizing outcome of Board proceedings

SMITH, GRAHAM, ALLEN OUELLETTE AND CHARLES WILBURN; RE BSOIW, LOCAL 700.....

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Discharge - Colleges Collective Bargaining Act - Duty of Fair Representation - Evidence - Unfair Labour Practice - Witness - College terminating applicant's contract after three years' employment in bookstore - Union grieving but grievance premised on acceptance of idea that applicant was contractual employee and not person in bargaining unit - Applicant alleging that union and college breaching Colleges Collective Bargaining Act (CCBA) in various way related to fact that she was treated as contractual employee, rather than as member of bargaining unit - Board finding that union violated its duty of fair representation - Board also finding that college failed to renew applicant's contract in response to her seeking intervention of union and that college maintained bookstore position as contractual, at least in part in order to avoid applicant being able to exercise rights as member of bargaining unit - Board drawing adverse inference from failure of college vice-president to testify regarding actual reasons for employer's non-renewal of applicant's contract - Application alleging that college violated section 75(2) of CCBA allowed

LA CITÉ COLLÉGIALE OTTAWA AND OPSEU; RE MURIELLE WAITO.....

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Duty to Bargain in Good Faith - Ratification and Strike Vote - Unfair Labour Practice - Board applying decision in <i>Burns Meats</i> and finding that unions violating section 17 of the Act by striking over issue that certain issues be bargained on a multi-unit/multi-province basis - Board holding that unions not complying with section 79 of the Act by pooling strike vote ballots cast in multiple bargaining units and by counting them together - Board declaring strike unlawful - Application allowed	
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Employee - Certification - Construction Industry - Board concluding that its long-standing approach of applying the <i>Trades Qualification and Apprenticeship Act</i> (TQAA) to applications for certification in the construction industry relating to compulsory certified trades applies to applications brought under section 146(3) of the Act - Board also holding that it is incorrect to conclude that someone who does not satisfy the obligations contained in the TQAA may accordingly be characterized as a "construction labourer" - Where an individual who worked for the employer on the certification application date spent a majority of time performing the work of a plumber but was working beyond the scope of the TQAA, that individual would be off the list of employees for purposes of the application	
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Employer - Construction Industry - Jurisdictional Dispute - Parties - Ironworkers' union and Glaziers' union disputing assignment of certain work in connection with unloading, lifting, handling, aligning, fastening and installation of new windows in punched openings at nursing home in Toronto - Board permitting applicant to amend its description of disputed work to include unloading, handling, rigging and installation of curtain wall at same project - Board granting designated Employer Bargaining Agency and party to ICI agreement with Glaziers' union intervenor status - Parties disputing identity of 'employer' assigning work - Board not accepting submission that general contractor assigning work by way of subcontract - Board applying <i>Napev Construction</i> case and finding subcontractor to be employer for purpose of section 99(1)(b) of the Act - Ironworkers' union having no bargaining rights with subcontractor - Board finding that disputed work properly assigned to Glaziers	
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Employment Standards Act - Timeliness - Directors applying for review of order of employment standards officer and securing irrevocable letters of credit satisfactory to Director of Employment Standards 50 days after date of order - Board exercising its discretion to extend time for applying for review where extension is quite short and there appears to be legitimate dispute regarding quantum of order to pay	
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LA CITÉ COLLÉGIALE OTTAWA AND OPSEU; RE MURIELLE WAITO 636

Health and Safety - Board declining request made by municipality under section 61(7) of *Occupational Health and Safety Act* to suspend order of inspector pending hearing of merits of its appeal - Board's concern regarding scope of inspector's order outweighed by severe health and safety consequences which could result to public and workers from suspension of order and failure of applicant to identify prejudice it would face if order maintained

REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH, THE; RE MOL 709

Health and Safety - Crown Employees Collective Bargaining Act - Essential Services - OPSEU and Management Board asking Board to determine several issues arising from essential service bargaining conducted pursuant to *Crown Employees Collective Bargaining Act* - Board concluding that it is not open to the Board to order the employer not to use replacement workers in the event of a work stoppage, nor to direct that that determination should guide the parties in their negotiation of an essential services agreement - Board directing parties to negotiate terms and conditions of essential and emergency service workers who may be required to work in the event of a work stoppage - Board directing parties to negotiate as part of essential service agreement a protocol to ensure that a designated bargaining unit essential service worker who is unable to attend at work can be replaced by another bargaining unit worker - Board directing parties to bargain as part of essential service agreement a protocol for those situations where a designated essential service worker exercises the right to refuse unsafe work under *Occupational Health and Safety Act*

CROWN IN RIGHT OF ONTARIO, THE (AS REPRESENTED BY MANAGEMENT BOARD SECRETARIAT); RE OPSEU 578

Health and Safety - Employer asking Board to suspend order of inspector under section 61(7) of *Occupational Health and Safety Act* pending disposition of appeal - Inspector directing that a health and safety representative be selected from among the employer's employees at a particular location - Application to suspend order granted

UNDERWRITERS' LABORATORIES OF CANADA; RE OPEIU, LOCAL 520 AND MOL .. 750

Hospital Labour Disputes Arbitration Act - Reference - Board finding that employees of catering company, working as cooks, dietary aides and porters at nursing home are "hospital employees" within meaning of *Hospital Labour Disputes Arbitration Act*

CLOVER CATERING C.O.B. AT BARTON PLACE NURSING HOME; RE H.E.R.E. LOCAL 75 570

Intimidation and Coercion - Construction Industry - Damages - Duty of Fair Referral - Remedies - Unfair Labour Practice - Board earlier finding that local union's operation of hiring hall violating duty of fair referral - Board also finding that union violated Act by threatening one applicant with charges if he looked into union's finances and by giving applicants written notice that they were being charged for unspecified violations of constitution - Board concluding that threats were reprisals imposed on applicants for exercise of rights under the Act - Board directing union to take all steps necessary to ensure that operation of hiring hall complies with section 75 of the Act as described in earlier Board decision - Damages for lost wages and pension contributions calculated and ordered - Board also directing union to provide each member with copy of Board notice summarizing outcome of Board proceedings

SMITH, GRAHAM, ALLEN OUELLETTE AND CHARLES WILBURN; RE BSOIW, LOCAL 700 719

Jurisdictional Dispute - Construction Industry - Employer - Parties - Ironworkers' union and Glaziers' union disputing assignment of certain work in connection with unloading, lifting, handling, aligning, fastening and installation of new windows in punched openings at nursing home in Toronto - Board permitting applicant to amend its description of disputed work to include unloading, handling, rigging and installation of curtain wall at same project - Board granting designated Employer Bargaining Agency and party to ICI agreement with Glaziers' union intervenor status - Parties disputing identity of 'employer' assigning work - Board not accepting submission that general contractor assigning work by way of subcontract - Board applying *Napev Construction* case and finding subcontractor to be employer for purpose of section 99(1)(b) of the Act - Ironworkers' union having no bargaining rights with subcontractor - Board finding that disputed work properly assigned to Glaziers

AGS CONTRACT GLAZING LIMITED, AND PAT, LOCAL 1819, GLAZIERS, PCL CONSTRUCTORS CANADA INC.; RE IRON WORKERS DISTRICT COUNCIL OF ONTARIO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 721; RE THE ARCHITECTURAL GLASS AND METAL CONTRACTORS ASSOCIATION

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Jurisdictional Dispute - Construction Industry - Carpenters' union and Labourers' union disputing assignment of tending work associated with erection and dismantling of scaffolding - Board holding that general tending work is *prima facie* in work jurisdiction of construction labourer, that all other tending work is within work jurisdiction of carpenter, that general tending work should be assigned to one or more construction labourers (unless there is insufficient general tending work required to keep a construction labourer occupied for a minimum of 4 hours in a working day) - Board also holding that an additional construction labourer must be assigned to perform general tending work when there is sufficient such work to keep the first labourer fully occupied for a full working day and there is additional work to fully occupy another labourer for an additional four hours - Board concluding that employer is free to assign additional construction labourers to perform general tending work as appropriate and that fact that amount of general tending work available is less than 4 hours worth of work does not mean that that work is within Carpenters' work jurisdiction

DOUG CHALMERS CONSTRUCTION LIMITED ("CHALMERS") AND LIUNA, LOCAL 1089 ("LABOURERS"); RE CJA, LOCAL 1256 ("CARPENTERS").....

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Jurisdictional Dispute - Construction Industry - Sector Determination - Labourers' union and Carpenters' union disputing assignment of work in connection with concrete for base slab and containment walls built in connection with salvage and replacement of high concentration glycol storage tanks - Carpenters' union bargaining rights with employer restricted to ICI sector of construction industry - Board concluding that disputed work falling outside ICI sector and accordingly that work properly assigned to members of Labourers

DUFFERIN CONSTRUCTION CO. AND CJA, LOCAL 18; RE LIUNA, LOCAL 837

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Jurisdictional Dispute - Construction Industry - Millwrights' union and Ironworkers' union disputing assignment of certain work described as removal and rigging of worn chain clips, pins and chains, and the rigging, installation and welding of new chain clips, pins and chains at paper mill lime kiln in Board Area 22 - Board holding that work was properly assigned to 50-50 composite crew of ironworkers and millwrights - Employer directed to assign this work on 50-50 composite crew basis in Board Areas 22, 23, 24 and 25

EKT 90 INC., IRON WORKERS DISTRICT COUNCIL OF ONTARIO, BSOIW, LOCAL 759; MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1151

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Jurisdictional Dispute - Construction Industry - Bricklayers' union and Cement Masons' union disputing assignment of certain stone masonry restoration work - Board satisfied that work ought to have been assigned to Bricklayers' union

PHOENIX RESTORATION, A DIVISION OF PHOENIX GUNITE SERVICES LIMITED AND OPCM AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL 598; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 10

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Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Timeliness - Employer objecting to consideration of union's grievance by Board on grounds that grievance untimely, that grievance is really a disguised jurisdictional dispute complaint, and the challenge to assignment of work has already been referred by applicant union to Canadian Plan for Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan") - Board finding portion of grievance untimely and striking it out - Board agreeing that the grievance constitutes a jurisdictional dispute and that the dispute had already been referred to the Plan - Board deferring consideration of grievance pending resolution of jurisdictional dispute under the Plan

ONTARIO HYDRO AND EPSCA; RE IBEW, LOCAL UNION 1788; RE PAT DISTRICT COUNCIL NO. 46

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Parties - Construction Industry - Employer - Jurisdictional Dispute - Ironworkers' union and Glaziers' union disputing assignment of certain work in connection with unloading, lifting, handling, aligning, fastening and installation of new windows in punched openings at nursing home in Toronto - Board permitting applicant to amend its description of disputed work to include unloading, handling, rigging and installation of curtain wall at same project - Board granting designated Employer Bargaining Agency and party to ICI agreement with Glaziers' union intervenor status - Parties disputing identity of 'employer' assigning work - Board not accepting submission that general contractor assigning work by way of subcontract - Board applying *Napev Construction* case and finding subcontractor to be employer for purpose of section 99(1)(b) of the Act - Ironworkers' union having no bargaining rights with subcontractor - Board finding that disputed work properly assigned to Glaziers

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LA CITÉ COLLÉGIALE OTTAWA AND OPSEU; RE MURIELLE WAITO.....

0966-98-U Abitibi-Consolidated Inc., Applicant v. Communications, Energy And Paperworkers Union of Canada and its Locals 90, 92, 109, 132, 238 and 306, Responding Party

Duty to Bargain in Good Faith - Ratification and Strike Vote - Unfair Labour Practice - Board applying decision in *Burns Meats* and finding that unions violating section 17 of the Act by striking over issue that certain issues be bargained on a multi-unit/multi-province basis - Board holding that unions not complying with section 79 of the Act by pooling strike vote ballots cast in multiple bargaining units and by counting them together - Board declaring strike unlawful - Application allowed

BEFORE: *Timothy W. Sargeant*, Vice-Chair, and Board Members *D. A. Patterson* and *J. Ronson*.

APPEARANCES: *Peter Thorup* for the applicant; *David McKee* for the responding party.

DECISION OF TIMOTHY W. SARGEANT, VICE-CHAIR, AND BOARD MEMBER J. A. RONSON, August 24, 1998.

1. This is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") that the responding parties have breached section 17 of the Act and not complied with section 79 of the Act.
2. The Board issued a bottom line decision on June 19, 1998, with reasons to follow.
3. This decision sets out the reasons for the Board's findings and orders in the June 19, 1998 decision.
4. The Board heard from six witnesses. There is really no dispute in the evidence on the issues in dispute. It is unnecessary for the purposes of this decision to review such evidence exhaustively.
5. In or about May, 1997, Stone-Consolidated Corporation merged with Abitibi-Price Inc. to form Abitibi-Consolidated Inc. ("ACI"). ACI operates a total of 14 paper mills in Ontario, Quebec and Newfoundland. In Ontario, the paper mills are located at Fort Frances, Fort William, Iroquois Falls and Kenora. This decision only deals with the locations in Ontario.
6. The responding parties (C.E.P.) and its predecessors have bargained with some of the predecessors of ACI on a company wide basis since 1975.
7. There has been history of bargaining certain designated issues at a central table. Depending on the history of the mill (i.e. whether a former Stone-Consolidated Corporation mill or a former Abitibi-Price Inc. mill) the format of central bargaining had slight differences. For the purpose of this decision it is enough to know that some form of company-wide bargaining settled collective agreements at Abitibi-Price Inc. in 1984, 1987, 1990, 1993 and 1996. This would include the Fort William and Iroquois Falls locations. In relation to the locations at Fort Frances and Kenora (formerly owned by Ontario Minnesota Pulp and Paper Company, then Boise Cascade Canada and then by Stone-Consolidated Corporation prior to the merger) bargaining prior to 1996 had taken place on a company-wide, multi-union basis. That is, bargaining took place between the Company representing both mills on one side and ten local unions (including three CEP Locals) on the other. This changed in 1993 when bargaining took place between each mill and all of the local unions at each mill.
8. All of the collective agreements between ACI and the CEP expired on April 30, 1998.

9. For the 1998 round of negotiations ACI concluded that it no longer wished to participate in joint bargaining for any of the mills operated by ACI.

10. By letter dated December 18, 1997, Mr. Marcel Matteau, Senior Vice-President, Labour Relations informed Mr. Fred Pomeroy, President of CEP in part:

Our experience of recent years indicates that our negotiation process should be approached on a Mill by Mill basis.

Please note that we are preparing for the 1998 negotiations based on the above-mentioned approach.

11. Mr. Matteau, indicated that he wrote this letter in December 1997 as it would be prior to the CEP's Wage Policy Conference to be held in February. His understanding was that the CEP and its locals set its agenda at this conference and he wanted to notify the CEP in advance of ACI's position.

12. Prior to a Wage Policy Conference each Local is asked whether it wishes to "opt in" to central or main table negotiations. Once a local opts in, it cannot opt out except with the consent of all of the other locals who have opted in. For 1998 all the locals in Ontario opted in. In fact, except for one mill in Quebec, all the locals in the mills involved in Ontario, Quebec and Newfoundland opted in. The union then set its Agenda at the Wage-Policy Conference. Ultimately CEP's proposal to ACI on the process for negotiation was that:

- 1) local issues be bargained at each mill;
- 2) contract language common to all collective agreements in the Abitibi or Stone or Boise agreements would be negotiated with the locals and mills in that former corporate grouping; and
- 3) issues common to all locals and mills, primarily monetary, would be bargained on a company wide basis involving all locals and all ACI representatives.

13. The CEP clearly wished to bargain certain issues on a multi-unit/multi province-wide basis. This was made clear to ACI.

14. Both parties had understandable reasons for their difference in approach to how the process for negotiations should be conducted (hereinafter referred to as the "process").

15. A meeting was held on March 25, 1998 between corporate representatives of ACI and executives of the CEP to see if agreement on process could be reached. No agreement was reached. A further meeting occurred on May 20, 1998 in which ACI proposed a compromise position. The executive members of the union present at that meeting felt they did not have the authority to accept such a proposal without approval of the various locals. It was clear from the testimony of Mr. Whitlom that the executives were not prepared to recommend such proposal to the locals. According to Mr. Whitlom the union was not prepared, in his view, to negotiate with itself and "dump" several items from the central table. The position of the union executives was that ACI should present their proposal to the locals. ACI felt the executive should take the proposal to the locals. As a result the proposal was never presented to the locals and the strike scheduled to begin on June 15, 1998 commenced.

16. At the conciliation meetings at the four locations, the format was basically similar in each case. The parties met face to face and the CEP representative asked for a written response to the union's proposals. The Company representatives at each conciliation meeting indicated they had no written response but orally stated that ACI was looking for a six year agreement, 365 days of running time,

competitive wages and cost containment as opposed to expansion in relation to benefits. In each case, the Company indicated it would at some point give a written response. At this point, a “no board” report was requested by the local in question. As of the date of hearing, no written response has been given by ACI to any local in Ontario on what the CEP considers main agenda items. However, it was clear, from the testimony of the union’s witnesses that no CEP representative would negotiate what it considered main agenda items at the local level.

17. The witnesses did agree that no negotiations have taken place on monetary items and that the strike occurred because of the impasse over process namely whether negotiations on certain items should proceed on a “mill by mill basis” or on a “multi-unit/multi province basis”.

18. In relation to the strike votes held at each local in Ontario, the evidence established that though votes were held at the individual locals, the ballots themselves were sent to Montreal and pooled with all other ballots from all other locals in Quebec and Newfoundland. This, as union witnesses testified, was done so nobody could identify how any one individual local had voted. In the result, the vote count was overwhelmingly in favour of a strike.

19. While there was evidence on other matters, such evidence is not necessary to consider for purposes of the Board’s findings and orders made on June 19, 1998.

20. It is to be noted that neither party questioned the *bona fide* of their respective positions. In regards to the section 96 application alleging a breach of section 17, the issue clearly was whether the CEP could take its position on process to impasse.

21. Having heard the witnesses, considered the agreed upon facts and listened to the submissions of the parties, the Board has no difficulty in concluding that the issue of process led to the current impasse and strike.

22. Concerning the section 17 allegation, counsel for ACI in essence submits that the Board’s jurisprudence, which has been followed in other jurisdictions, supports the position that taking a demand for multi-unit/multi province bargaining to impasse is bargaining in bad faith. In counsel’s submission, the leading case on this issue is *Burns Meats Ltd.*, [1984] OLRB Rep. Aug. 1049.

23. Counsel for the CEP concedes that *Burns Meats Ltd.* is directly against his position that the demand of multi-unit/multi province bargaining may be bargained to impasse and may properly be a strike issue. In counsel’s submission, the conclusions of the Board in *Burns Meats Ltd.*, (*supra*) are wrong in law. Thus counsel submits that statements in the decision to the effect that to attempt to bargain beyond provincial jurisdiction is an attempt by the union “to bargain beyond the legal scope of their exclusive bargaining rights contrary to the scheme of the Act” are clearly wrong in law. Counsel argues that the lawful existence of a trade union does not depend on Statute law and further that a collective agreement has a lawful existence as a contract and does not depend on the Act for its existence. Thus in counsel’s submission the Board has made a fundamental error in *Burns Meats Ltd.*

24. During the course of argument, counsel referred to the following cases among others in addition to *Burns Meats Ltd.*: *T. Eaton Company Limited*, [1985] OLRB Rep. Mar. 491; *Northwood Pulp and Timber Limited* an unreported decision of the *British Columbia Labour Relations Board* dated July 15, 1994, *Steelco Inc.*, 1990, 4 CLRBR (2nd) 305; *Western Cablevision Ltd.*, 65 di 150, *Radio Shack* [1979] OLRB Rep. Dec. 1220, *Molson Ontario Breweries Limited*, [1985] OLRB Rep. Apr. 558, *National Elevator and Escalator Association* [1992] OLRB Rep. Mar. 345, *Crafter Hand Woven Harris Tweed Co. Ltd.*, 1942 AUED Volume 142; *Canadian Industries Limited*, [1976] OLRB Rep. May 199; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397, and *Re Canadian Union of Public Employees* 1 DLR (4th) 1, and *Commercial Graphics Limited*, [1993] OLRB Rep. June 483.

25. In *Burns Meats Ltd.*, the employer and the union had historically bargained a Master agreement for units in Alberta, Manitoba and Ontario. Such structure had been in place for more than 30 years. At the expiry of the most recent Master agreement, the employer informed the union that it no longer wished to bargain nationally for the Kitchener plant but wished to have local negotiations at this site. The Union persisted in demands for national bargaining. The employer brought a complaint to the Board alleging that the union had breached its duty to bargain in good faith.

26. On this issue, the Board stated at paragraphs 27 through 29:

27. The scheme of the Act is that collective bargaining shall take place with respect to employees for whom a trade union has the exclusive representational rights in collective bargaining. In order to be in a position to bargain for employees, a trade union must hold bargaining rights under a collective agreement within the meaning of section 1(1)(c) of the Act, a certificate issued to it under the Act or voluntary recognition as contemplated by the Act. It is possible that the International, by one or more of these means, holds bargaining rights for all six of the employer's plants covered by the Agreement. As noted above, it is unnecessary for the purpose of this complaint and the Board's jurisdiction for the Board to determine whether in fact that is the case. Even if the International has the exclusive rights to represent in collective bargaining all of the employer's employees in those plants, the legal limit of those rights with respect to this complaint and the Board's jurisdiction is the Province of Ontario, and hence in this fact situation, the employer's Kitchener plant. What the respondents are seeking to do with their demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which traditionally have been covered by the Agreement, is bargain beyond the legal limits of the exclusive rights attaching to the Kitchener plant. For the respondents to pursue that objective to impasse is inconsistent with the scheme of the Act that bargaining shall be in respect of a bargaining unit of employees for which a trade union has exclusive bargaining rights. In the Board's decision in *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. 776, particularly paragraph 18 on page 784, it was because the Board found it inconsistent with the scheme of the Act for the United Brotherhood to pursue to impasse the objective of expanding its exclusive bargaining rights by voluntary recognition on a province-wide basis that the Board found the United Brotherhood in breach of section 15 of the Act. While the specific objectives of the respondents and the United Brotherhood differ, the result is the same; an attempt to bargain beyond the legal scope of their exclusive bargaining rights contrary to the scheme of the Act. In this respect, see also the Board's decision in *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138 at paragraph 29. For these reasons, it is inconsistent with the scheme of the Act and unlawful for the respondents to take to impasse their bargaining objective of a single nation-wide set of negotiations and a single national collective agreement.

28. It may well be that the respondents have pursued their impugned course of conduct for the objective of preserving for the Kitchener Plant employees the uniform wages and working conditions which they have in common with employees in the other plants covered by the Agreement. While that objective is not itself illegal, for the reasons set forth above, the means by which the respondents are attempting to achieve it are contrary to the Act. It is not unlawful for a union to bargain for wages and working conditions paralleling those at other plants operated by the employer. The Board's approach to enforcing the section 15 duty has allowed parties to collective bargaining broad freedom to determine the subjects about which they will bargain and the contents of their collective agreements. See *United Brotherhood of Carpenters*, *supra*, paragraph 9, and the authorities referred to therein. That freedom flows from the premise that "... the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment." *De Vilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49. The freedom of parties to fashion the terms of agreements is not without limits, however. For example, it does not extend to being able with impunity to insist upon a demand which would give rise to an illegality (*T. Barlisen & Sons*, [1960] OLRB Rep. May 80); to resort to economic sanctions in pursuit of unlawful or illegal demands (*Croven Limited*, [1977] OLRB Rep. Mar. 162); or to press to impasse a demand inconsistent with the scheme of the Act (*United Brotherhood of Carpenters*, *supra*). It is not possible to delineate in the abstract the totality of the limits on that freedom. Any further delineation of the limits must be on a case by case basis in the context of an actual fact situation.

29. It is clear from the facts respecting the meetings between the employer and the respondents on April 18th, May 24th and July 3rd, 1984, the rejection of the employer's last offer and the circumstances surrounding the strike which commenced on June 17th, that a major factor in the strike is the respondents' demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which had been traditionally covered by the Agreement. Thus the respondents have already pursued to impasse a bargaining objective which can be raised and discussed but, for the reasons set forth above, cannot legally be pressed to impasse in the exercise of the exclusive bargaining rights with respect to the Kitchener Plant.

27. This decision was rendered in 1984. Since that time it has been quoted with approval in the *Northwood Pulp and Timber Limited* decision (*supra*) and the *Stelco Inc.* decision (*supra*). Also relevant are statements to the same effect in the *T. Eaton* decision (*supra* see statements at page 502 paragraph 37), and the *Western Cablevision Ltd.* decision (*supra* - see statements at pages 155 to 159).

28. The Board has carefully considered the argument of counsel for the union but does not agree that *Burns Meats Limited* is fundamentally flawed. The *Burns Meats Limited* decision in our view does not deal with the issue of whether a collective agreement is enforceable beyond its boundaries or not, but rather considers the jurisdiction of the Board in relation to a bargaining unit certified under the *Labour Relations Act*. In that consideration, the Board found at paragraph 27 that in relation to multi/province bargaining, "for the respondent to pursue that objective to impasse is *inconsistent with the scheme of the Act that bargaining shall be in respect of a bargaining unit for which a trade union has exclusive bargaining rights*" (emphasis added).

29. The Board therefore concurs with the decision of *Burns Meats Limited* and thus found in its decision of June 19, 1998, that "the responding parties had breached section 17 of the Act by taking to impasse the issue that certain issues be bargained on a multi-unit/multi-province basis".

30. On the issue of whether the responding parties had or had not complied with section 79 in conducting strike votes at the individual bargaining units at Fort Frances, Fort Williams, Iroquois Falls and Kenora sites, counsel for ACI submits that by pooling the ballots the responding parties had not complied with the procedures required under section 79. Counsel for the responding parties submits that the process followed by the CEP in this instance did comply with the provisions of section 79. In counsel for CEP's submission the strike votes were taken in the relevant time period. Further, each local prior to the vote being taken had agreed to the process of how the vote would be conducted and agreed to one count (i.e. pooling).

31. During the course of argument on this issue the parties referred to the following cases: *J. Franze Concrete Ltd.*, [1995] OLRB Rep. June 813, *Elgin Construction*, [1995] OLRB Rep. June 783 and *J. P. Fogal* [1976] OLRB Rep. Aug. 428.

32. Section 79(1) 79(7) and 79(8), 79(9) of the Act provide as follows:

79. (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(7) A strike vote or a vote to ratify a proposed collective agreement or memorandum of settlement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(8) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement or memorandum of settlement.

(9) Any vote mentioned in subsection (7) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots. If the vote taken is otherwise than by mail, the time and place for voting must be reasonably convenient.

33. Section 79(8) provides that all employees in a bargaining unit shall participate in a strike vote. The issue is whether a pooled vote would satisfy the requirements of section 79(8). The concern is obviously that in a pooled vote, it is not known whether an individual bargaining unit voted for or against a strike.

34. Though there is no Board decision directly on point certainly there is an indication from the Board in decisions such as *Elgin Construction* and *J. Franze Concrete Ltd.* in considering in part language similar to section 79(8) (then section 74(5)), that a strike vote will only be considered valid if it is counted from the ballots of those employees in the individual bargaining unit concerned.

35. For example in *Elgin Construction* in considering section 74(5) of Bill 40, the Board stated at paragraph 43:

The Legislature obviously did not intend subsection [74(5)] to give non-member employees in every bargaining unit represented by a trade union the right to vote in any strike or representation vote that union might choose to conduct.

36. As a further example in the *J. Franze Concrete Ltd.* decision another case under Bill 40, the Board in considering what was then 74(5) of the Act (similar to what is now section 79(8)) stated (paragraph 49):

We do not accept the union's submission that the use of the term "a bargaining unit", as opposed to "the bargaining unit", in subsection 74(5) means that the bargaining unit description for the purposes of a strike vote can differ from an existing bargaining unit, provided it is an appropriate one. In our view, the expression "a bargaining unit" in section 74(5) refers to the bargaining unit as described in the Board certificate or voluntary recognition agreement by which the trade union acquired bargaining rights, or as amended in a collective agreement entered into between the parties, and does not indicate that some other bargaining unit can, provided it is appropriate, be adopted for the purposes of the strike vote.

37. In this instance, the Board is similarly of the view that the Legislature cannot have intended that ballots from bargaining units in Quebec and Newfoundland be included in a count authorizing a strike in an individual bargaining unit in Ontario. Employees in each bargaining unit should have the opportunity to determine whether that unit wishes to authorize a strike.

38. The Board thus found in its decision of June 19, 1998 "that the responding parties have not complied with section 79 in conducting strike votes for the individual bargaining units at the Fort Frances, Fort William, Iroquois Falls and Kenora sites" and that therefore employees in such bargaining units were engaging in an unlawful strike.

DECISION OF BOARD MEMBER D. A. PATTERSON: August 24, 1998

1. The following is my detailed dissent from this panel's oral ruling of June 19/98.

2. I agree with my colleagues on the evidence before the Board. However, I depart from the majority's findings in their decision because based on the evidence before the Board. I have drawn different conclusions.

3. I do not dispute either party's right to table proposals for a new collective agreement which in fact could lead to and culminate in the parties being deadlocked and facing a potential cessation of

work based on strike action or a lockout by the employer. Every renewal for a new collective agreement poses that potential when bargaining commences.

4. I also do not dispute, within the scheme of the Ontario Labour Relations Act, the bargaining structure entered into by the parties is of a voluntary nature. In the instant case, the dispute between the parties arose when the applicant gave notice to the respondent that it no longer wished to participate in the established bargaining process which matured over the last 20 plus years.

5. The applicant has relied heavily on the Board's jurisprudence, in particular, *Burns Meats Ltd.* (1984) OLRB Rep. August 1049, a leading case. The facts in *Burns Meats Ltd.*, *supra* are very similar to the facts in the instant case. However, upon closer examination of the Burns case I am of the opinion that the instant case is distinguishable from Burns. In the Burns case the applicant in that case gave specific reasons for its withdrawal from coordinated, industry wide chain bargaining. The following comments in *Burns Meats Ltd.*, (1984) OLRB Rep. Aug. 1049 in paragraph 15:

15. The reason contended by the employer for wanting to bargain on a local bases is that its Kitchener plant competes in a local or a regional market and several of its competitors enjoy lower rates of wages and benefits. Three of those competitors are represented by the International and are not part of any national bargaining format.

These reasons in my opinion put the applicant in Burns at a competitive disadvantage, beyond the control of the applicant. At the same time the applicant could have addressed those very issues in bargaining with the union. In the instant case the applicant's letter to the union is short on explanation or reasoning, citing as its only reason being the process 'should be approached on a Mill by Mill basis'. The majority in their reasons either chose not to mention the evidence the Board heard from the applicant, why it had taken the position it did on national bargaining. Or in the alternative did not believe this evidence relevant. I, however, would have concluded that the Board must consider the reasoning behind a party's decision to opt/in or out of a voluntary process where there is a proven historical bargaining relationship, as in the instant case.

In the evaluation of those reasons given, the Board must evaluate the relevance of such assertions and weigh their impact on the labour relations, that in my opinion is the Board's responsibility. We are to regulate the relationship between employer and employee union's.

6. I believe its our sole responsibility to act in the interests of sound labour relations practices which in the final analysis enhances the labour relations climate within the jurisdiction of the province of Ontario. In the instant case historically there have only been 2 strikes, 1975 and 1980, both of which were the result of the desire for industry wide coordinated bargaining. Since those two strikes the parties have bargained successive collective agreements without any labour unrest or strike activity. That very success is exactly what this Board is continually striving to achieve in its adjudication of any dispute which comes before the Board.

The Board in *Commercial Graphic Limited* (1993) OLRB Rep. June 483 commented in paragraph 25 of that decision:

- 25 Where parties have voluntarily organized their bargaining structures in rational ways, such as pattern bargaining in a particular industry, the Board will be reluctant to undermine such procedures by allowing one party, at the end of bargaining, to renounce the negotiating format and obtain a singular advantage for itself through invoking the Board's processes.

It also went further in the same paragraph in stating:

... However, the Board will exercise its discretion to fashion appropriate remedies in ways which will enhance the process of collective bargaining rather than to provide any part with a "tactical windfall" which will ultimately undermine negotiations and the parties' collective agreement relationship.

As my esteemed Brother stated in his minority dissent in the *Burns Meats Ltd.* (1984) OLRB Reg Aug. 1049 at paragraph 1 of his dissent:

1. ... whatever gains the complainant may have achieved in the short term by destroying a natural bargaining structure must be measured against the long term effect of fragmenting collective bargaining with its employees and attempting to weaken the union's bargaining position.

The Act and the Board should not be the sword or the shield in attaining bargaining objectives. The applicant in the instant case was well aware of two key factors in making its determination in filing this application. First, the union and its members have struck on this very issue in two other occasions. Secondly the local unions of the National Union have the right to opt in/out of the central bargaining structure and the demands for that bargaining structure are debated and decided by convention vote at the CEP's Wage Policy Conference.

The applicant in my opinion cannot use the Act to destroy a labour relations mechanism or process which is highly successful in its own longevity. The applicant's reasoning for its change in approach to bargaining was not based on a National premise or from a competitive edge. Its reasoning as explained during its evidence was based on cost containment, a long term (5 years) agreement and 365 days running time of its operation. All of which I maintain could be dealt with at the central bargaining table. It was not the applicant's position these proposals were externally driven. There was evidence of the industry's approach in the United States and British Columbia in terms of bargaining. Those circumstances were not alleged to be the applicant's reason for opting out of the established bargaining structure.

7. I believe other events substantiate my dissent in that the respondent was not in breach of the Act. The union and its representatives did meet the employer, local by local and did table the only document which was endorsed by the participating local unions at the CEP National Wage Policy Conference albeit, the proposal tabled was the same, they could also be characterized as the same proposals the applicant would have received if the bargaining protocol would have been agreed to. It was the applicant, in fact who would not or chose not to table a written proposal for the union's consideration. The applicant rather chose to give its position verbally.

By virtue of the union's attempt to table its proposals for settlement, should be sufficient intent to show its good faith. The resulting aftermath could be characterized as 'hard bargaining' or the union's resolve to negotiate similar terms and conditions at all of its Ontario based plants where it enjoyed bargaining rights.

A similar type of case between the University of Toronto and the Educational Workers was taken to arbitration. J.D. O'Shea, Q.C., (Ontario) arbitrated the grievance between *Governing Council of University of Toronto and Canadian Union of Educational Workers, Local 2*, July 29, 1983 reported in II LAC (3rd) Page 358. On page 368 O'Shea stated:

... Had the university refused to consider the union's proposals and had the university refused to meet with the union in response to its request to bargain, I might have reached a different conclusion.

The same interpretation can be extended to the instant case. If the respondent would have refused to meet the applicant in conciliation and tabled its position then the applicant's argument would be more persuasive.

8. I would have added my opinion to that of the majority if in the majority's ruling they would have ordered the parties back to the bargaining table. I would not have found a breach of the Act.

I am not convinced from what I heard from either party in this proceeding that there was conduct of animus or bad faith. Both have strong views on their interpretation of bargaining strategies. The resulting outcome in this case as a environment of 'hard bargaining'. The Board has long held 'hard bargaining' is not a breach of the Act. Each party must be able to press their demands, especially in bargaining situations where there is a mature historical bargaining relationship, unfettered by the Board.

9. I believe the bargaining protocol could have been resolved. The final resolve might not be in the same form as either party started out with but if the parties want to conclude a collective agreement, both will have to focus on the challenge both face in the situation.

10. I make the following comments about the concept of industry wide bargaining and co-ordinated bargaining from the view that it is one of the success stories of labour relations. Its' own history in the construction industry as well as the industrial and health care, service industry speaks volumes for the system and how it works. In this case before the board the parties have developed a very sophisticated structure which is comprised of rules of reference for participating locals and their respective elected representatives. It is driven by a highly democratic structure which lends itself to efficient and smooth functioning of a mechanism which at the best of times can be bargaining puzzle for the uninitiated observer. When we the board see such structures we should be loathe to undue what both these parties have mutually come to terms with over the last number of decades. I can only ask the question which the entire community of labour relations practitioners will ask when they read the majority decision. Is this the direction the board wants the construction industry, auto industry, mining industry, steel industry, health care industry, service industry and others to follow. I can only surmise the net outcome is complete chaos and labour relations upheaval. This kind of jungle mentality is not in the best interests of this province nor its citizens.

In the instant case the applicant is a major player in the wood industry and the respondent is also a major player. Entire communities depend on the industry for their livelihood and well being. This is not a situation where the parties don't know each other. Both readily admit to their own successes over the last number of decades. These parties will set the pattern of bargaining for the industry, I do not buy into the assertion that either British Columbia or the United States will set the pattern for this group, it is much too large and influential for external parties to impact on these negotiations.

11. I think the majority erred in law and in judgement in their decision.

1098-97-JD Iron Workers District Council of Ontario and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721, Applicants v. PCL Constructors Canada Inc., AGS Contract Glazing Limited, and International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers, Responding Parties v. The Architectural Glass and Metal Contractors Association, Intervenor

Construction Industry - Employer - Jurisdictional Dispute - Parties - Ironworkers' union and Glaziers' union disputing assignment of certain work in connection with unloading,

lifting, handling, aligning, fastening and installation of new windows in punched openings at nursing home in Toronto - Board permitting applicant to amend its description of disputed work to include unloading, handling, rigging and installation of curtain wall at same project - Board granting designated Employer Bargaining Agency and party to ICI agreement with Glaziers' union intervenor status - Parties disputing identity of 'employer' assigning work - Board not accepting submission that general contractor assigning work by way of subcontract - Board applying *Napev Construction* case and finding subcontractor to be employer for purpose of section 99(1)(b) of the Act - Ironworkers' union having no bargaining rights with subcontractor - Board finding that disputed work properly assigned to Glaziers

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

APPEARANCES: *Gary Caroline, Frederica Wilson, Aaron Murphy* and *Tony Almeida* for the applicants; *Bruce Binning* and *Dale Heacock* for PCL Constructors Canada Inc.; *S.B.D. Wahl* and *D. Lynch* for International Brotherhood of Painters and Allied Trades, Local 1819; *Peter Straszynski* and *Francis Lee* for AGS Contract Glazing Inc; *Douglas Gilbert, Kline Holland* and *Barry Eon* for The Architectural Glass and Metal Contractors Association.

DECISION OF THE BOARD; August 18, 1998

I. Introduction and Preliminary Matters

1. This is an application regarding a work assignment filed with the Board in accordance with section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). This proceeding was scheduled for an oral consultation before this panel of the Board on November 28, 1997 and May 29, 1998.

2. At the outset of the consultation, the Board heard a preliminary argument regarding the scope of the work in dispute. We also entertained the submissions of the parties on a preliminary issue raised by the applicants; namely, whether the Architectural Glass and Metal Contractors Association ought to be provided intervenor status in this proceeding.

3. As initially filed with the Board, this application defined the work in dispute as "the unloading, lifting, handling, aligning, fastening and installation of new windows in punched openings at the Cummer Lodge nursing home, 205 Cummer Avenue, Toronto, Ontario". Upon review of the responding parties' materials which were filed with the Board, the applicants became aware that curtain wall had also been installed at that same project. By way of letter dated November 6, 1997, counsel for the applicants requested that the work in dispute be redefined to encompass as well the unloading, handling, rigging and installation of curtain wall at the project. Counsel also clarified that the applicants claimed jurisdiction over the caulking and sealing work on the project, which it included in the concept of "installation".

4. We will not outline the full arguments of the parties on the preliminary matters in these reasons for decision. The applicants noted that the parties which had filed materials with the Board (particularly the International Brotherhood of Painters and Allied Trades, Local 1819 (hereinafter referred to as "the Glaziers")) had included in their briefs considerable documentation regarding the performance of curtain wall, and questioned the prejudice involved in permitting a broader definition of the work in dispute. The Glaziers submitted, through counsel, that the applicants (hereinafter referred to as "the Iron Workers") had waited far too long before raising this proposed amendment with the Board, and that the nature of the arguments and the submissions before the Board would be affected by such an amendment. Counsel for the other parties (hereinafter referred to as "PCL", "AGS" and

“Architectural Glass”, as the case may be) adopted, to varying degrees, the argument made on behalf of the Glaziers.

5. After a brief recess, the Board provided the parties with the following decision:

First, there can be no dispute that the Architectural Glass and Metal Contractors Association is a proper party to this consultation, and we see no reason why it cannot make full submissions based upon the materials filed with the Board to date.

Secondly, with respect to the issue of the proper scope of the work in dispute, we are of the view that all of the work, including curtain wall, punched window openings, and the caulking of same, should be considered at one time. Having considered the argument of counsel, we are unconvinced that the merits of that work assignment dispute cannot be properly dealt with on the basis of the materials filed with the Board to date. Accordingly, we intend to proceed with this matter today, on the merits. Reasons for this decision will issue in conjunction with a decision on the merits.

6. We set out our reasons for this decision briefly. First, with respect to the participation of Architectural Glass, that entity is the designated Employer Bargaining Agency as defined in section 151 of the Act. It is a party to the ICI collective agreement with the Glaziers and could be directly affected by any decision of the Board in this consultation. Accordingly, Architectural Glass was a proper party to this proceeding and was granted intervenor status.

7. With regard to the issue of the proper scope of the work in dispute, it was evident that the parties had buttressed their materials regarding punched opening windows with evidence regarding performance of curtain wall work. Accordingly, there was no meaningful prejudice which accrued to any party if the consultation proceeded with a broader scope. The arguments raised by the Glaziers regarding what further evidence would have been filed with the Board had the work in dispute been described to include curtain wall at the outset were not persuasive. In the three week period between the time that the request for amendment was made and the consultation was convened, evidence of that nature could have been easily prepared by the Glaziers and provided to the parties and the Board, if it had any real probative value. It was not. There was a relatively minor amount of curtain wall work performed at the Cummer Lodge project, and it made very little sense to hive it off from the other window work for the purposes of this proceeding. Accordingly, we ruled as indicated above.

II. The Merits of the Work Assignment

(a) Background Facts

8. There does not appear to be a great deal of dispute amongst the parties regarding the background events leading to the work assignment dispute. It would appear that in early February, 1997, Mr. Kevin Santalucia, a business agent for the Iron Workers, was advised that PCL had obtained the general contract for the Cummer Lodge project. Shortly thereafter, the Iron Workers, through its counsel, wrote to PCL to remind PCL that it was bound to the Iron Workers' ICI collective agreement with the Ontario Erectors Association. Counsel also noted in this letter that PCL was not bound to the Glaziers' ICI collective agreement, and identified his understanding that the Iron Workers' ICI collective agreement covers the installation of both windows and curtain wall. The letter from counsel stated that, given PCL's lack of contractual obligations to the Glaziers, "we suggest that the window and curtain wall packages for [this project] be let to subcontractors which are also bound to the [Iron Workers' ICI collective agreement]".

9. Approximately one week later, Mr. Santalucia discovered that PCL intended to subcontract the work in dispute to AGS, a company which is not contractually bound to the Iron Workers but instead is bound to the Glaziers' through its ICI collective agreement with Architectural Glass. The Iron Workers' immediately filed a grievance, alleging that PCL had violated the subcontracting provision of

the Iron Workers' ICI collective agreement by subcontracting work to an employer not in contractual relations with the Iron Workers. Shortly thereafter, Mr. Paul Schmalz, PCL's Vice President and District Manager, wrote to counsel for the Iron Workers and advised him that PCL would be tendering the window work "in accordance with normal industry practices". He went on to state that PCL would be prepared to invite both Iron Worker subcontractors and Glazier subcontractors to bid for the work.

10. The grievance filed by the Iron Workers was referred to the Board, pursuant to section 133 of the Act. Approximately two weeks later, counsel for the Glaziers contacted counsel for the Iron Workers and advised that the Glaziers intended to intervene in the grievance proceeding. In the result, the Iron Workers indicated that it would file a jurisdictional dispute with respect to the work assignment at the Cummer Lodge project, which is the instant proceeding. The grievance referral was adjourned pending the disposition of this jurisdictional dispute application.

11. In fact, PCL did award the work in dispute to AGS. It would appear that invitations to bid were advertised in the Daily Commercial News and were forwarded to both Iron Worker subcontractors and Glazier subcontractors. Two bids were received by PCL. No Iron Worker subcontractor bid on the window work. Of the two bidders, only AGS bid in accordance with the specifications for the job. Accordingly, PCL subcontracted the window work to AGS.

(b) Decision

12. When determining a jurisdictional dispute complaint, the Board considers any and all factors relevant to the proper assignment of the work. As a general observation, the Board has historically given consideration to certain factors including the following:

- (a) employer practice and preference;
- (b) area practice;
- (c) trade agreements;
- (d) collective agreement obligations;
- (e) trade union constitutions;
- (f) skill, training and safety; and
- (g) economy and efficiency.

In any particular case, one or more of these factors may be of special significance, and will be given greater weight than other factors. In this proceeding, the parties touched on each of the above factors during the course of argument.

13. In the circumstances of this proceeding, the factors of employer practice, area practice, and collective agreement obligations are inextricably intertwined. Although there was significant disagreement amongst the parties regarding the genesis of bargaining rights obtained by the Iron Workers with what was referred to as the "PCL group of companies" (a disagreement which we need not resolve for the purpose of this proceeding), there is no question that PCL is, by way of a voluntary recognition agreement dated February 8, 1996, bound to the Iron Workers' ICI collective agreement with the Ontario Erectors Association. PCL is not bound in any way to the Glaziers' ICI collective agreement. AGS, on the other hand, is bound to the Glaziers' ICI collective agreement, but is not bound to apply the terms of the Iron Workers' ICI collective agreement.

14. It is, at this stage, important to set out the statutory provision which underlies the Board's authority to entertain jurisdictional disputes such as that before this panel of the Board. Section 99 of the Act provides the Board with this authority. For the purposes of this proceeding, the wording of section 99(1)(b) of the Act is pertinent. It reads as follows:

99(1) This section applies when the Board receives a complaint,

- b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another;

That is, the statute establishes that the Board has jurisdiction to hear a work assignment complaint when an “employer was or is assigning work”. It is therefore necessary to identify, in each proceeding, the employer assigning the work. This is particularly critical in a work assignment complaint, because the Board considers “employer practice” to be a significant factor in resolving these disputes.

15. There is usually no dispute on the identity of the “employer” assigning work for the purposes of a work assignment complaint. Not so here. Both the Glaziers and the Iron Workers disagree on the identity of the entity which assigned the work in dispute. The Iron Workers assert that the “employer” for the purposes of section 99(1)(b) of the Act is PCL, which “assigned” the work by way of subcontract to AGS. The Glaziers, on the other hand, assert that the “employer” for the purposes of this proceeding is AGS, which actually assigned the work to its employees. The other parties support the position taken by the Glaziers on this point.

16. In our view, there can really be no dispute that, in this proceeding, the “employer” for the purposes of section 99(1)(b) of the Act is AGS. Four cases were put to the Board (two from each of the Iron Workers and the Glaziers) dealing with this question, containing greater or lesser analysis. By far the most persuasive decision is that of *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247. At that time, the jurisdictional dispute provisions of the *Labour Relations Act* (section 81(1)) read slightly differently, combining what is now section 99(1)(a) and 99(1)(b) of the Act. The differences in the statutory wording is not a meaningful factor. The question before the Board in *Napev Construction Ltd.* was whether a trade union’s grievance against Napev or the subcontracting provision in the collective agreement between them constituted “a request of an employer by a trade union that work be assigned to its members”. The Board made the following comments in its decision:

10. To begin our analysis, we note that while Napev might be described as an employer for the purposes of the agreement with Local 2, there is no evidence that Napev directly employs any bricklayers or masons at the subject site. It, of course, subcontracted this work to Venice. However, section 81(1) would appear to be referring to an employer who is directly performing “the particular work” because it describes this work as work the employer had initially assigned “to persons in another trade union”. If Napev can be said to have assigned any work, it assigned masonry work to another employer - a subcontractor. The subcontractor (Venice) in turn directly assigned this work to persons in a trade union, i.e. members of Local 1. Thus, on a close reading of the subsection, the term employer is more reasonably referable to Venice than to Napev. The only way to avoid the implications of this interpretation would be to “look through” Venice and equate the subcontracting of the masonry work to Venice as being, in fact, an assignment of work by Napev to members of Local 1. However, this approach ignores the substantial history of interpretation accorded to the subsection and makes a difficult equation between the verbs “assign” and “subcontract”. On this latter point, an assignment of work in industrial relations more usually describes the direct allocation of work by an employer to his employees or, at least, to persons in a particular trade union. And in the context of a jurisdictional dispute under section 81, the section contemplates that the Board might have to alter this assignment in order to resolve the conflict. On the other hand, the contractual relationship between Napev and Venice is usually described as a subcontract. But, if any doubt remains, legal precedent underpinning this subsection renders these initial impressions indisputable.

Continuing on at paragraph 18, the Board reaches its conclusion:

18. ... While the existence of subcontract clauses may be symptomatic of underlying jurisdictional conflict and anxiety, the Board’s mandate for intervening in this aspect of labour relations is limited by the specific words employed in section 81(1). On the basis of this wording and for the reasons outlined above, it cannot be said that once a contract is let pursuant to a subcontract clause a trade union is inevitably requiring “an employer” to assign particular work to persons in a particular

union. A subcontract clause in a collective agreement is a contractual arrangement between a trade union and general contractor limiting the range of subcontractors the general contractor may utilize in the construction of a project. As the analysis above demonstrates, it cannot be said that the general contractor is the employer for the purposes of section 81(1) nor can it be said, at least in the abstract, that the existence of a subcontract clause constitutes a request to all subcontractors that work be assigned to members of a particular trade union. ...

17. We agree with the analysis of the Board respecting the identity of the “employer” which is outlined in the *Napev Construction Ltd.* decision. There is a substantive difference between “subcontracting” work and “assigning” work. In our circumstances, PCL clearly subcontracted the work in dispute to AGS. AGS, just as clearly, assigned the work to its employees, who were members of the Glaziers, in accordance with its contractual obligations. It cannot be said that PCL “assigned” any work, as defined by section 99 of the Act. There is no dispute here that PCL did not directly employ any employees to perform the work in dispute. In fact, there was a consensus amongst the parties that this particular niche of the construction industry is “a subcontractor’s game”.

18. The cases relied upon by the Iron Workers are not as persuasive as *Napev Construction Ltd.*, and in fact are contrary to longstanding Board case authority (see, for example, *Robertson Yates Corporation Limited*, [1992] OLRB Rep. Apr. 507, at para. 12; *Harold R. Stark Company Limited*, [1982] OLRB Rep. Feb. 222, at para. 10; *Scope Mechanical Contracting Limited*, [1984] OLRB Rep. Feb. 379, at paras. 10 and 11; and *Four Seasons Drywall Systems and Acoustics Limited*, [1989] OLRB Rep. June 599, at para. 8). In both *Allied Architectural Systems Ltd.*, [1995] OLRB Rep. Oct. 1243, and *The McBride Group* (Board File 0278-96-JD, unreported decision dated January 31, 1997), the decisions of the Board appear to equate a subcontracting situation with an assignment of work. In *Allied Architectural Systems Ltd.*, for example, Allied was bound to collective agreements with both the Labourers’ and the Iron Workers. Allied subcontracted certain work to a contractor bound only to the Labourers’ collective agreement. In the work assignment proceeding brought by the Iron Workers, the Board notes, at paragraph 11, that:

By subcontracting the work in dispute to a contractor bound only to the Labourers’ collective agreement Allied in effect assigned the work to the Labourers.

19. Likewise, in *The McBride Group*, also a jurisdictional dispute proceeding, McBride subcontracted certain masonry restoration work to Colonial, which in turn subcontracted the work to Pro-Tech Restoration. Pro-Tech was a signatory to a collective agreement with Local 598 of the Operative Plasterers (at the request of Colonial) but employed non-union workers at the project. Eventually, Colonial removed Pro-Tech from the job and undertook the work with its own employees, who were members of Local 598. Both Bricklayers’ Local 7 and Labourers’ Local 527 challenged the assignment of the masonry work. During the course of the consultation, the question of the identity of the entity assigning the work was raised. The Board made the following observations at paragraph 15 of the decision:

Local 598 suggested that the key factor in the matter was identifying “the employer” for the purposes of assessing employer past practice. In its submission, the employer was not McBride - with whom the Bricklayers have a collective agreement - but rather was McBride’s subcontractor, Colonial - which has a collective agreement with Local 598 - since it actually employed the people who performed the work. We were not persuaded by the argument that the Bricklayers’ claim amounted to an attempt at a “backdoor” expansion of its bargaining rights. In our view, the [sic] McBride had obtained the contract for the stone masonry restoration work and had ultimate control and direction of the work in dispute. Despite its collective agreement obligation to the Bricklayers’, McBride chose to subcontract to a company that was not in contractual relations with the Bricklayers.

20. A few observations are in order regarding these cases. It is evident that the issue raised squarely by the instant proceeding was not specifically raised in *Allied Architectural Systems Ltd.*. It

would appear that all of the parties assumed that a subcontract equated to an assignment of work. This substantially weakens the authoritative nature of that decision on the question in issue before this panel of the Board. Additionally, the use of the words “in effect” makes one question whether that panel of the Board intended the conclusion submitted by counsel for the Iron Workers. If that panel of the Board meant to suggest that a subcontract was an assignment of work for the purpose of section 99 of the Act, one wonders why the words “in effect” were written at all.

21. In *The McBride Group* decision, the issue before this panel of the Board was squarely before the panel of the Board assigned to that case. Again, though, it is not apparent from the reasons for decision of the Board that substantial argument was entertained on the issue, as no case authority was cited in support of the conclusions reached by the Board. It also appears from paragraph 12 of the decision that the reasons were provided for the benefit of the parties in what is described as a “summary” fashion. This may explain the lack of any supporting authority. In all of the circumstances, we do not give *The McBride Group* decision significant persuasive weight. We are satisfied that the preferable result in all of the circumstances is that reached by the Board in *Napev Construction Ltd.*, and the other cases cited above in paragraph 18.

22. Having reached that conclusion, we turn to the various factors relevant to the issue before us. It has been observed by the Board before that employer and area practice have become dominant considerations in work assignment disputes (see, for example, *Ecodyne Limited*, [1997] OLRB Rep. Mar./Apr. 197, at para. 16). Here, consideration of both of those factors strongly suggest that the work in dispute was properly assigned to the Glaziers. The employer’s historical practice has been to assign the work in dispute exclusively to members of the Glaziers. Furthermore, during the course of argument counsel for the Iron Workers conceded that 70% of the work in dispute in Board Area 8 is performed by members of the Glaziers. It would appear, then, that the vast majority of the work in dispute is performed by members of the Glaziers in Board Area 8. The performance of the work in dispute by PCL and/or the “PCL group of companies” is but a single element of the area practice evidence.

23. In *Ecodyne Limited*, cited above, the Board observed, at paragraph 15, that some of the general factors considered by the Board may well be of little or no assistance in any one case. In particular, the Board noted in that decision that, “in recent years, work jurisdictions asserted by construction trade unions in their constitutions and collective agreements have become so broad that these will often not favour the claim of any trade union ...”. For the most part, this is the case here. It appears to us that the collective agreements relied upon by both the Glaziers and the Iron Workers contain language which support the jurisdictional claim made by each union. That being said, we also agree with the observation made by counsel for the Glaziers that the wording contained in the Glaziers’ ICI collective agreement and its constitution more accurately captures the work in dispute and therefore that the Glaziers have a marginally stronger claim as a result.

24. Considering the other factors of significance, in our view the factors of skill, training and safety, and economy and efficiency are neutral. The materials filed with the Board do suggest that the Glaziers have a more comprehensive training program for its members than do the Iron Workers. However, there is no question that members of the Iron Workers quite capably perform the work in dispute. In the circumstances, then, there is no meaningful difference in skill, training or safety dependent upon which trade performs the work.

25. Turning to a consideration of trade agreements, there is no written trade agreement between the Glaziers and the Iron Workers which was relied upon by the parties. However, the parties both relied upon what was characterized in the materials filed with the Board (somewhat errantly, it appears) as an “informal understanding” between them to claim the work in dispute.

26. In essence, the Iron Workers state that an understanding has developed between the Glaziers and the Iron Workers with regard to subcontracts by general contractors that are either non-union or are bound to both the Iron Worker and Glazier ICI collective agreements. These contractors can subcontract the work to the lowest bidder. However, when an Iron Worker contractor obtains a contract to perform the work in dispute, that contractor will only use Iron Workers or other Iron Worker subcontractors to perform the work. The same principle is said to apply to Glazier contractors. The Glaziers (along with the other parties supporting the Glaziers) take issue with the Iron Workers' description of this "informal understanding". It states that the understanding establishes that general contractors may let the work in dispute to subcontractors in contractual relations with either the Iron Workers or the Glaziers, and that neither trade would challenge that assignment.

27. Work jurisdiction trade agreements, if utilized by the parties to those agreements to govern the assignment of work, may be determinative of a jurisdictional dispute (see, for example, *Kora Mechanical Inc.*, [1992] OLRB Rep. June 740). Here, though, such a result is not appropriate. The materials before the Board do not reflect the "informal agreement" as defined by the Ironworkers. However, even if we were to conclude that the "informal understanding" between the parties was as described by the Iron Workers, such an understanding would be only one factor supporting the position of the Iron Workers, and not sufficiently persuasive to merit determinative status in favour of the Iron Workers in this proceeding.

28. Of significance in this proceeding is the fact that the Iron Workers do not have a collective bargaining relationship with AGS. It has been stated by the Board on numerous occasions that a trade union that has no applicable collective agreement with the employer which assigned the work will encounter a difficult time altering the work assignment. However, it has also been remarked that a trade union with a collective agreement with the employer assigning the work will not necessarily be successful in defending a claim for work brought by a trade union without a collective agreement (see, for example, *Elecon Electrical Contractors Inc.*, [1995] OLRB Rep. May 645, *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846, and *Ellis-Don Ltd.*, [1994] OLRB Rep. Sept. 1222). In *Pigott Construction Limited*, [1992] OLRB Rep. June 748, (commonly referred to as "*Pigott #2*"), the Board declared that the work in dispute in that application should have been assigned in accordance with a work jurisdiction agreement between two trades, which effectively awarded the work in dispute to members of a trade union which did not have a collective bargaining relationship with the assigning employer.

29. In *Groff & Associates*, cited above, the Board identified the circumstances under which a trade union without a collective agreement relationship would be successful in a work assignment dispute, at paragraph 20:

Although the lack of a collective bargaining relationship will not necessarily be fatal to a trade union's claim for work, the result in cases like *Pigott #2* should not be taken to suggest either that the collective bargaining relationship factor is unimportant, or that the Board will necessarily direct that work be assigned to members of a craft trade union, even where the Board concludes that some or all of the work in dispute should have been assigned to the craft/trade in which members of that trade union are engaged. On the contrary, a trade union which complains about an assignment of work but has no collective agreement on which to base its claim will have to satisfy the Board that there are compelling labour relations reasons to interfere with the employer's assignment.

We agree with this observation. In the circumstances, there is no compelling labour relations reason to interfere with the assignment of work in dispute made by AGS.

30. This leads us to the final observation which we desire to make in this proceeding. During the course of reply argument, counsel for the Iron Workers very forcefully submitted that the effect of reaching a conclusion that the work in dispute was assigned by AGS as the "employer", and that the work was properly assigned by AGS to members of the Glaziers, would be to enshrine "employer

freedom of choice” as a legitimate factor for the determination of work assignments. That is, it was suggested that such a conclusion would permit employers to take into account commercial considerations as a factor in determining the assignment of work. Furthermore, it was submitted that another effect of such a result would be to entirely undercut the significance of the subcontracting provision contained in Article 2 of the Iron Workers’ ICI collective agreement, and that bargaining rights held by a trade union with a general contractor would have no value or meaning.

31. We disagree with these submissions, and reject the conclusions which counsel for the Iron Workers submits would result from our finding that AGS is the “employer” for the purpose of section 99(1)(b) of the Act, and that the assignment made in the circumstances was appropriate. As was noted by the Board at paragraph 18 of *Napev Construction Ltd.*, cited above, subcontracting clauses are important elements of trade union security and stability in the construction industry. They are a valuable tool utilized by the construction trades to ensure that work opportunities are maintained by those trades for their members.

32. What we fail to understand, however, is why it is that one must conclude that an adverse result in this proceeding for the Iron Workers sounds the death knell for subcontracting provisions in collective agreements. This proceeding had as its genesis an application brought under section 133 of the Act, alleging that PCL had violated the subcontracting provision contained in the Iron Workers’ ICI collective agreement. It appears from the materials before the Board that when the Glaziers indicated that it would intervene in that proceeding, the Iron Workers agreed to adjourn the grievance arbitration in order to file this proceeding, which it has done.

33. We have now concluded that AGS is the “employer” for the purposes of section 99(1)(b) of the Act. We have reached no conclusions whatsoever about the merits of the outstanding proceeding pursuant to section 133 of the Act. It would appear from the comments of counsel at the oral consultation that PCL will assert at the section 133 proceeding that the failure of an Iron Worker subcontractor to bid on the work in dispute justified its subcontracting the work in dispute to AGS rather than to an Iron Worker subcontractor. Whether this is or is not a legitimate defence to the grievance will be determined by the panel of the Board hearing that proceeding.

34. What is clear to us is that nothing that we have stated in this proceeding has any determinative effect on the pursuance of the grievance arbitration currently in abeyance. PCL either violated the subcontracting provision contained in the Iron Workers’ ICI collective agreement or it did not. If it did, then upon sufficient evidence establishing damages the Iron Workers will be compensated for its losses. If it did not, then the Iron Workers will not be entitled to any compensation. The merits of any work assignment made by AGS after PCL has subcontracted the work - properly or improperly - can have absolutely no bearing on the propriety of PCL’s decision to subcontract the work in dispute in the first place. This panel of the Board has made no findings on that latter issue whatsoever.

35. It appears to us that this proceeding is, in essence, an attempt by the Iron Workers to utilize the subcontracting provision in its ICI collective agreement binding PCL as a means to elbow its way to the front of the line in an area of construction work which is and has traditionally been dominated by subcontractors bound to the Glaziers’ ICI collective agreement. As the Board has previously stated (see *Elecon Electrical Contractors Inc.*, cited above, at para. 14), the Board is not inclined to require an employer to subcontract work to another employer in a particular way, or at all. In *Napev Construction Ltd.*, cited above, at paragraph 17, the Board noted that the Canada Labour Relations Board had previously indicated its concern that subcontracting clauses not be “unfairly used by aggressors in jurisdictional battles”. The Glaziers, and some of the parties aligned with the Glaziers in this proceeding, argued that this is what the Iron Workers were really attempting to do here. It appears to us that there may be some accuracy to that observation.

36. In the circumstances, we uphold the assignment of the work in dispute made by AGS, and dismiss this application.

1588-98-ES Darivs Bhathena o/a Atlantic Express, Applicant v. Rocco DeFrancesco and Ministry of Labour, Responding Party

Employment Standards Act - Timeliness - Board declining to consider request for extension of time limit to bring application for review until applicant pays into trust monies directed by order to pay

BEFORE: *M. A. Nairn*, Vice-Chair.

DECISION OF THE BOARD; August 10, 1998

1. An application for review of an order to pay was filed on July 31, 1998. However the applicant has not paid the monies into trust as is required by section 68 of the *Employment Standards Act* as amended by the *Economic Development and Workplace Democracy Act, 1998*, S.O. 1998, c. 8. The , applicant requests an extension in order to pay the funds into trust.

2. Section 68 of the *Employment Standards Act* as amended, provides in part, as follows:

68 (3) An application for a review must be made,

- (a) in the case of an application for a review of an order, within 45 days after the date of the order;
- (b) in the case of an application for a review of a refusal to issue an order, within 45 days after the date of the letter advising of the refusal or the date on which the refusal was deemed to have occurred under subsection 67(2).

(4) Subject to subsection (5), the Board may extend the time for applying for a review if it considers it appropriate to do so.

(5) In the case of an order that requires the payment of money to the Director in trust, the Board may not extend the time for applying for a review if the Director has paid the money to an employee or employees under subsection 72(2).

(6) An application for a review must be in writing.

(7) An application for a review of an order requiring the applicant to pay an amount is not properly made and the Board shall not proceed with the review unless, within the time for applying for the review, the applicant pays the amount to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director.

3. Sub-section 68(3) of the *Employment Standards Act* as amended, requires that an application for review be made within 45 days after the date of the order to pay. Sub-section 68(7) states that an application for review of an order to pay is not properly made *unless* the monies are paid into trust.

4. The essence of those provisions is to require the payment into trust of those monies directed by an order to pay *as part of* the application for review. An application for review is not complete unless the monies have been paid into trust. The Board's available discretion under sub-section 68(4) is to extend the time for applying for a review, not to extend the time for paying monies into trust. In order to exercise that discretion, the conditions precedent to making an application need to be met in order to

determine whether the late filing of that application may be appropriate. It seems inconsistent with the statute to effectively extend the 45 day time limit where a complete application for review has not yet been filed. Such an approach is also more consistent with the prohibition set out in sub-section 68(5). Once an application is properly filed the Board may consider whether it is appropriate in the circumstances to extend the time for applying and allow the matter to proceed.

5. Alternatively in the request before me the applicant states a present inability to pay without any supporting submissions. That assertion is insufficient to warrant an extension.

6. This request for an extension to the time for applying for review is therefore denied.

4006-96-R D. Vandermeer, C. Thain, and a Group of Employees, Applicants v. United Food and Commercial Workers International Union, Locals 175 and 633, Responding Party v. Banlake Associates Limited c.o.b. as **Bancroft I.G.A.**, Intervenor

Termination - Board finding that employer financially supported termination application and that management had been instrumental in application's initiation - Board dismissing application under section 63(16) of the Act and directing that ballots cast in representation vote be destroyed

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

APPEARANCES: *Bruce Seigny*, *Dirk Vandermeer* and *Cindy Thain* on behalf of the Group of Employees of Banlake Associates Ltd. c.o.b. as Bancroft I.G.A.; *David M. Chondon* and *Bud Schramm* for Bancroft I.G.A.; *Kelvin Kucey*, *Ovila Dagenais* and *Bill Cooper* for UFCW.

DECISION OF GAIL MISRA, VICE-CHAIR AND BOARD MEMBER H. PEACOCK; August 18, 1998

1. This is an application for the termination of bargaining rights, filed pursuant to section 63 of the *Labour Relations Act, 1995*, seeking a declaration that the responding party no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. The collective agreement between the responding party (the "union" or "UFCW") and the intervenor (the "employer" or "Bancroft IGA") expired on March 24, 1996. This application was filed on February 28, 1997, and was found by the Board (panel somewhat differently constituted) to be timely. In its response to the application the union alleged a breach of section 63(16) of the Act in that it claimed there had been employer threats, coercion and intimidation in connection with the application, and/or that the employer or a person acting on its behalf had initiated the application. In light of the allegations made, the Board ordered that a representation vote be held among the employees of the Bancroft IGA, but that the ballot box be sealed pending the outcome of these proceedings.

3. At the time the termination application was made the bargaining unit at the Bancroft IGA had been engaged in a legal strike since October 21, 1996. In the spring of 1997 the workplace parties were able to conclude a collective agreement which was ratified by the majority of bargaining unit members, leading to the conclusion of the strike on May 1, 1997. Notwithstanding that the strike was settled, the applicants wished to proceed with this termination application, and it therefore came on for hearing on August 25, 1997. The Board held nine days of hearing, concluding in March 1998.

4. In the course of the hearing, eight persons were called as witnesses. In addition to their testimony, the Board has before it 17 exhibits which were entered during the course of the proceedings. In making the findings and reaching the conclusions set forth in this decision, the Board has duly considered all of the oral and documentary evidence, the submissions of counsel, and the usual factors germane to assessing evidentiary credibility and reliability, including the firmness and clarity of the witnesses' respective memories, their ability to resist the influence of self-interest when giving their version of events, the internal and external consistency of their evidence, and their demeanour while testifying. The Board has also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

5. Since the Bancroft IGA store was a strike-bound workplace during the initiation and circulation of the petition collected in support of the termination application, the evidence led by the union in this case was somewhat unusual. The union summoned the two applicants to give evidence, along with two individuals who had been on the picket line, one former employee of the Bancroft IGA, one other employee who had crossed the picket line during the strike, and one union official. No evidence was called by the applicants, while the employer called the General Manager of the store to give evidence regarding his role. The owner of the store for most of the relevant period, Mr. Jerry Howarth Sr., did not testify.

THE FACTS

6. On January 28, 1993 the UFCW was certified as the bargaining agent for the employees of the Bancroft IGA. As the parties could not reach a collective agreement initially, the employees engaged in a legal strike. Eventually, to reach the first collective agreement, the parties had to participate in first contract arbitration. In 1996 the union began to bargain for a second collective agreement. On February 23, 1996 an application was made for the appointment of a conciliation officer. The union later filed a number of complaints of unfair labour practices arising out of the second round of negotiations, and there has been considerable litigation at the Board regarding these matters. In September 1996, and until the end of December 1996, the employer failed to comply with some of the Board's orders emanating from those matters. The union therefore filed a consent to prosecute application with the Board. There was also a court application made by the union alleging that the employer was in contempt. A legal strike began in October 1996. A brief recital of this history is simply to illustrate that the workplace parties have had a fractious relationship from the time of certification.

7. The employer is a grocery store located in Bancroft, Ontario, serving both the local Bancroft population and cottagers in the summer time. It is one of two grocery stores in the town. Mr. Jerry Howarth, Sr. was the owner of the operation, and ran the store until July 1996, when Bud Schramn was hired as the store's General Manager. Mr. Howarth Sr. was the chief negotiator for the employer until some time in January 1997, at which time Mr. Schramn took over negotiations. The next level of management of the store is comprised of Ron Mountney, the Store Manager and Director of Store Sales, and Ed Sturgeon, the Assistant Store Manager. Department managers, and a head cashier, are persons who are within the bargaining unit represented by the union. However, on Sundays or on the very odd occasion when Messrs. Schramn, Sturgeon and Mountney are not available, Ron Koppin, the grocery department manager, is in charge of the store. Mr. Koppin is the only department manager who has an office, which he shares with Messrs. Mountney and Sturgeon. Store clerks, cashiers and meat cutters make up the remainder of the bargaining unit.

8. Mr. Schramn has been the General Manager of the Bancroft IGA since July 22, 1996. Previously he had worked for 27 years with Oshawa Foods, and for the last 11 years of his tenure with that company had been on the road going to stores as a retail counsellor to advise stores on retail sales

and profitability. He had never, previous to this round of negotiations, been involved in bargaining with a trade union.

9. It would now appear that from July 1996 on there was a deal in the making pursuant to which Mr. Schramn would buy the Bancroft IGA store from Mr. Howarth Sr. However, Mr. Howarth Sr. remained active at the store for some time, until around January 1997, because the deal was not complete. Prior to Mr. Schramn joining the Bancroft IGA, Mr. Howarth Sr. had indicated to Mr. Schramn that he would handle the negotiations for a new collective agreement, and Mr. Schramn had believed that there would be a new collective agreement in place when he became involved in July 1996. Initially, Mr. Schramn simply ran the store, while Mr. Howarth Sr. continued as the owner and the one responsible for dealing with the union. The two men shared the General Manager's office throughout this period. In August 1996 Mr. Howarth Sr. would consult with Mr. Schramn about his negotiations with Mr. Fuller, but Mr. Schramn had little to say at that time. It was not until the strike began that Mr. Schramn realized he should be more involved as he had a financial interest in the future viability of the store.

10. John Fuller has worked for 33 years in the retail food industry and has spent the last 21 years as a staff representative for a trade union. For the last seven Mr. Fuller has been working for the applicant trade union. In June or July 1995 Mr. Fuller was appointed as the Eastern Regional Director, and as such became responsible for the Bancroft area.

11. He testified that the IGA stores are smaller grocery stores in Ontario. The Bancroft IGA is about 15,000 sq. ft. in size, compared to an average new A&P store, which would be about 50,000 sq. ft. in size. Mr. Fuller has been involved in this particular store from around the time it was organized in January 1993. In early 1996 the workplace parties began to bargain for a second collective agreement. On February 23, 1996 a conciliation officer was appointed by the Minister of Labour. Although several days of negotiations were scheduled, the employer cancelled them all. The collective agreement expired in March 1996. The union therefore asked for a "no board" report after April 15, 1996. At the behest of the employer, on May 15, 1996 a final offer vote was held in which the employees failed to ratify the employer's last offer. There were no negotiations from April to August 1996. The day following the final offer vote the employer unilaterally, and without any notice to the union, implemented a 25 cents per hour increase in wages, stopped remitting or deducting union dues, and stopped making the pension contributions to the employee pension plan. This led to the union filing unfair labour practice complaints with the Board.

12. In mid-June 1996 the union conducted a strike vote in which the employees voted narrowly in favour of striking. Although the union was in a legal strike position, it decided to try to continue to negotiate with the employer. In July the Board's Labour Relations Officer set up a meeting regarding the unfair labour practice complaint, but Mr. Howarth Sr., without any notice to the Board, failed to attend.

13. Ron Koppin, the grocery department manager, has held that position for the last eight years, but has worked at the store for about 18 years. As noted earlier, Mr. Koppin has a desk in an upstairs office of the store, where he shares space with two members of management and with Dorothy O'Connor, the bookkeeper. Mr. Koppin is the only bargaining unit member who has the use of an office and telephone, and has access to the store facsimile machine and photocopier.

14. On July 3, 1996, just after the union had received a strike mandate, Mr. Koppin prepared a petition which he circulated in the store asking for a new strike vote. He then faxed the petition to the union, using the employer's FAX machine and FAX cover sheet, and indicated that he would be giving Mr. Howarth Sr. a copy of the petition as well. The petition bore 33 signatures, including Messrs.

Koppin and Vandermeer, and Ms. Thain. Mr. Koppin has no recollection of how or when the signatures were collected.

15. The employer finally agreed to meet with the union on August 19, 1996. Some negotiations took place that day. On August 25 the union held a members meeting to discuss what had gone on in negotiations, and because the union was due to meet with the employer again on August 29. The meeting was held at the community centre ice rink in Bancroft. At that time Harold Maloney, the meat department manager, attempted to attend the meeting. Mr. Maloney has opposed the union from the start, and is not a member of the union. He is a long-service employee, and a friend of Mr. Howarth Sr. As such, Mr. Howarth Sr. was Mr. Maloney's best man at his wedding, he looks out for Mr. Howarth's property when Mr. Howarth Sr. is away, and he borrows Mr. Howarth's vehicles when his own is not running. The relationship between the two men is well-known among the staff of the Bancroft IGA. Mr. Fuller therefore quietly told Mr. Maloney before the meeting that he would not be able to attend as the meeting was for members only. Mr. Maloney challenged Mr. Fuller. The meeting was therefore convened, Mr. Fuller explained the situation to the members in open session, and, since Mr. Maloney continued to refuse to leave, Mr. Fuller adjourned the meeting for 10 minutes to meet with the Local Executive. The Executive was of the view that the meeting must go on as there were 30 or 35 members present who wanted to know what was happening in negotiations. Mr. Fuller therefore called the Ontario Provincial Police to request that Mr. Maloney be removed. He then went to find Mr. Maloney to tell him the Police had been called. When he found Mr. Maloney he was at a pay phone with Mr. Koppin, who was on the telephone speaking to someone. Mr. Fuller told Mr. Maloney he had called the police, and then said to Mr. Koppin "You're not calling Jerry Howarth are you?" Mr. Koppin admitted he was. Mr. Fuller returned to the meeting and, with sarcasm, told those assembled that they would wait till Mr. Koppin had returned with Mr. Howarth's instructions. Within minutes of the interchange by the telephone, and before the police arrived, Mr. Maloney's car was seen leaving the parking lot.

16. During negotiations on August 29, 1996 the parties had discussions about the modified closed shop provision in the collective agreement. The union wanted all employees to become members of the union. The employer vacillated on this subject because Mr. Howarth Sr. was concerned about what this would mean for Mr. Harold Maloney, his long-time friend and neighbour. Finally, the union suggested that Mr. Maloney could be exempt from having to become a member, but would have to pay union dues. Nonetheless, nothing substantial was resolved on that day of negotiations.

17. On September 5, 1996 the Board issued its decision in favour of the union in the unfair labour practice complaint. However, the employer failed to comply with the Board's decision. In September the employer gave the union another "final offer", but then withdrew that offer. The union returned to the Board regarding the employer's non-compliance with the Board's earlier decision and a further hearing was held. On December 23, 1996 the Board issued another decision ordering the employer to comply with various directions, to set a schedule to meet with the union for the purposes of collective bargaining, and to meet and bargain in good faith before January 15, 1997.

18. The strike commenced on October 21, 1996. That day Mr. Howarth Sr. ran an advertisement in the *Bancroft Times* naming those employees who were out on strike and laying out his position regarding the employer's negotiating position. All through the strike the union and employer each produced their own literature for distribution to the people of Bancroft, or as advertisements in the newspaper. From early in the strike, around October 25, 1996, the employer suggested that if the store was not supported, management may be "forced to close the doors".

19. Cindy Thain, one of the applicants, is a full-time store clerk in the Bakery Department of the Bancroft IGA. She has worked in the store since 1987, and at the time she testified was earning \$9.71 per hour. Ms. Thain indicated that the staff of this store are mostly long-term employees, although

there is some turn-over in staff. Immediately following certification in 1993, Ms. Thain and six other employees were dismissed from employment by Mr. Jerry Howarth Sr., the owner of the store at that time. As a result of a union complaint these employees were subsequently returned to work. Ms. Thain testified that she became concerned about the union's presence in the workplace when a successful strike vote was held in June 1996. She knew at that point that she would not go out on strike. Ms. Thain was not aware of negotiations following the commencement of the strike, either from the union or from inside the store.

20. From October on and through the winter this store is generally quiet as, given its location in Bancroft, it is largely dependent on cottagers for most of its business. During the strike the store remained open. On Friday, the busiest business day, the store would have 45 to 50 persons at work. From Tuesday to Thursday there would be between 22 and 25 persons at work. While the store lost business in the first two months of the strike, business began to pick up again around Christmas 1996. The store is open till 6 p.m. Saturday to Thursday, and till 9 p.m. on Friday.

21. Once the strike commenced, between 45 to 50 employees (including the applicants) crossed the picket line to continue to work. A central coffee pot was set up by the employer in the store, between the warehouse and the grocery store, for the use of all employees. This location became pivotal in discussions in the period leading up to the filing of the termination application. The employees appeared to have talked a lot during their time at work during the strike, particularly about how the strike appeared to be going on a long time, that the strike was hurting the business, that the store may close, and that the strike may therefore be jeopardizing their jobs. The conversations included both management and the department managers who were bargaining unit members: Jerry Michael Howarth Jr. (son of the owner of the store), Ron Koppin, Harold Maloney, Marj Mulholland, Darlene Storey, and Shirley Switzer. Mr. Howarth Sr. was in the store from time to time, but the store was managed by Messrs. Bud Schramn, Ron Mountney and Ed Sturgeon.

22. Mr. Vandermeer, Ms. Thain's co-applicant, is a meat cutter who has worked at the Bancroft IGA store for 17 years. He earns \$16.31 per hour, working full-time. He normally works from 8:30 a.m. to 5:30 p.m., Monday to Thursday, and till 9 p.m. on Fridays. Mr. Vandermeer had been part of the organizing campaign to bring in the union because at that time he felt that Mr. Howarth Sr. was causing a stressful atmosphere in the store, as a result of his confrontations and "blow-ups" with the staff. According to Mr. Vandermeer, Mr. Howarth Sr. is a tough man to deal with, a shrewd businessman and a hard negotiator who would not give in easily to union proposals. He was an intimidating owner and manager.

23. Within four to six weeks of the strike commencing, Mr. Vandermeer was aware of the fears, among those who had crossed the picket line, that the store may close. He recounted that Mr. Schramn would come up to groups of employees and say that they were doing the best they could to keep the store open, and that if the staff kept going and kept the store losses down, the chances looked good for remaining open. Mr. Vandermeer was working full-time during the strike, as were his two co-workers in the meat department. However, by January 1997 he noted that their volume of work was down by between one third and half of what it would have been at that time of the year, but for the strike. If the store had closed, Mr. Vandermeer would have had to sell his home and relocate to earn the income he was making at the Bancroft IGA. Ron Koppin testified that he had a personal concern as he was of the view that if the store closed, he would not be able to pay his mortgage.

24. The General Manager has no recollection of when he started to hear that there were rumours among the staff and some customers that the store would close because of the strike. Mr. Schramn also has no idea how this rumour got started. The employer had maintained the working hours of all full-time employees who had crossed the picket line and there had been no lay-offs. Part-time employees

had seen their hours cut dramatically. Mr. Schramn admits however that the October 1996 leaflet advertisement which says the following could have come from Mr. Howarth Sr.:

We the employee's [sic] (your neighbours, relatives and friends) working inside the IGA and the management are asking for the support of our neighbours, friends and relatives in our community to help us by shopping our IGA *so management is not forced to close the doors.*

25. Mr. Schramn did not want to get into a propaganda war with the union once the strike commenced in October 1996. He realized that without discussions with him, Mr. Howarth Sr. was responding in the media to the union's literature but he never discussed this matter with Mr. Howarth Sr. He further admitted that he did not know who, besides Mr. Howarth Sr. or himself could have written the document in question. Mr. Schramn did not write it. The document was on IGA letterhead, using a font which was like that utilized on the computer in the store office, to which Mr. Howarth Sr. had open access. Mr. Schramn agreed that employees would have very limited access both to the letterhead and to the computer, although they may have access to the photocopier, which is not located in his office. As noted earlier, Mr. Howarth Sr. did not testify at these proceedings.

26. After the dissemination of the leaflet Mr. Schramn recalls holding meetings with the staff in late November or early December 1996, five or six employees at a time, to assure them that the store was not closing. One or two employees asked him what to do to get rid of the union, but he told them he was not meeting with them to discuss that but to address the employees' fear about store closure.

27. Prior to the strike Ms. Thain cannot recall any staff meetings ever being held. During the strike Ms. Thain can only recall this one meeting of staff with management but cannot recall precisely when it took place. She too recalls that there were rumours circulating in the store about a possible closing of the grocery store. Thereafter, in mid-December 1996, Ms. Thain believes groups of six to eight employees at a time were asked to go in to meet with Bud Schramn. She believes that Mr. Schramn was trying to ease the minds of the employees who had crossed the picket line.

28. According to Ms. Thain, while she cannot recall who first mentioned the term "decertification" after the meetings with Mr. Schramn had been held, around Christmas 1996 the employees began to discuss how they could get rid of the union. These groups congregating around the coffee pot would be of between 8 and 20 people at a time, and could include both department managers and management personnel or have management personnel standing within earshot. Ms. Thain was of the view that since the union had been certified things with Mr. Howarth Sr. had got worse. There was tension in the store, there had been one strike already, and now a second was in progress, and Mr. Howarth Sr. did not work well with the union. Unlike Ms. Thain, Mr. Vandermeer's recollection is that prior to Christmas 1996 there were discussions among the staff about how they could get rid of the union. Like Ms. Thain, Mr. Vandermeer just cannot recall who came up with the word "decertification" and how it came to be used by the group of three employees who decided to pursue this matter. For some unexplained reason, the idea was put on hold in December.

29. The idea of decertifying solidified when Mr. Koppin claims he spoke to a truck driver who had successfully decertified the union in his workplace. At some point in December 1996 or January 1997 the driver told Mr. Koppin that it was easy to decertify a union as all one had to do was to collect names on a petition. In the middle of January Mr. Koppin and the applicants decided to take some action on this idea. He has no idea why this was the time at which they were galvanized into action, but says the idea got a "life of its own" at that point.

30. There were no negotiations between October and the end of December 1996. Following the Board's decision of late December, the union offered to bargain on January 2, 3 and 4, 1997. On

January 2, 1997 Mr. Howarth Sr. met with the union to bargain, and for the first time since negotiations had begun, he had Mr. Schramn involved in the negotiations. The parties, with the assistance of a provincial mediator, reviewed and signed off on what had already previously been agreed to because Mr. Howarth Sr. wanted to put everything on the record. Beyond that nothing was accomplished on the first day. On January 3 the parties and the provincial mediator met again and the union put on the table what the four important issues for it were. At the end of the day there had been no movement, and Mr. Fuller was of the view that the employer was wasting time to get to the open period. The negotiations for January 4 were cancelled.

31. According to Mr. Schramn, when there was seemingly no progress being made in negotiations by December 1996, he became more vocal and indicated that dates should be set for negotiations. After the January negotiation days, he told Mr. Howarth Sr. that he should back away and that Mr. Schramn should take over negotiations as he was of the view that there was a personality conflict between Messrs. Howarth Sr. and Fuller. Mr. Schramn indicated in his testimony that he believed the union did not want to reach an agreement on January 2, 1997. However in cross-examination he admitted that the union had brought the mediator to those sessions to attempt to broker a settlement, that the union had agreed to withdraw ten of its proposals, that it had told the employer the four key areas of concern for the union members, and that if those could be resolved then it may be possible to resolve the strike. He also admitted that after he and Mr. Howarth Sr. had discussed the union's proposals, the employer did not budge on any of the union's areas of concern. Mr. Schramn agreed that on the second day of bargaining, January 3, not much progress was made, and that Mr. Fuller had indicated that the employer appeared to be surface bargaining. Mr. Schramn says he did not know what that meant.

32. On February 4, 1997 the mediator called the workplace parties together. On this occasion Mr. Schramn was there alone on the employer's side. He indicated to Mr. Fuller that he now had the authority to bargain for the employer, and that although he would not agree to anything in writing, in principle he would agree with the union, and would live up to the verbal agreements. Mr. Fuller indicated he could not go to the union bargaining committee without an agreement in writing as there would be no way to enforce a verbal agreement if Mr. Schramn left the Bancroft IGA. Mr. Fuller did not know what Mr. Schramn's position was in the store, other than that he was the General Manager. He had heard a rumour that Mr. Schramn may be the new owner, but he had no confirmation of this. No agreement was reached at this meeting and no further negotiations were held in February before the decertification application was filed.

33. At some time in January 1997 Mr. Howarth Sr. left the country for Florida and Mr. Schramn was in control of the Bancroft IGA. When he took over negotiations he was aware that the union had contempt proceedings, an unfair labour practice complaint, and a consent to prosecute application outstanding against the employer. While Mr. Schramn seemed unable to tell the Board when in January Mr. Howarth Sr. left Canada, he assumed that Mr. Howarth Sr. must still have been in Bancroft on January 13, 1997, when Mr. Howarth Sr. apparently ran another advertisement in the local newspaper castigating the union and seeking public support for the store. He believed Mr. Howarth Sr. may have been back in Bancroft on January 19, as he recalls that Mr. Howarth Sr. was flying back and forth from Florida at that time.

34. Jason Boomhouer had worked part-time at the Bancroft IGA for three years from 1989 to 1993. He continues to live in Bancroft and therefore sees his former co-workers around the town regularly. Jerry Michael Howarth, Mr. Howarth Sr.'s son, is his next door neighbour so he sees Mr. Howarth Jr. as well.

35. On January 10, 1997 Mr. Boomhouer was having his hair cut at Gary & Di's Hairdressing Salon in Bancroft when he saw that Mr. Howarth Jr. was also in the salon. Mr. Boomhouer recalls the date precisely because he had bought a car on January 9, 1997, and his brother had brought it from Hamilton for him to pick up in Lakefield. Mr. Boomhouer had his back to Mr. Howarth Jr., but heard him speaking to one of the stylists. The stylist asked Mr. Howarth Jr. how the store was doing. Mr. Howarth Jr. said that his dad had a trick up his sleeve, that they were hiring new staff and would get the union out of the store. The stylist indicated that he thought the union looked pretty stupid walking up and down the sidewalk in the cold weather. Mr. Howarth Jr. told the stylist that they now had a lawyer in Ottawa. He then caught sight of Mr. Boomhouer in the mirror, their eyes met, and he stopped talking about this matter. The men began to talk about snowmobiling. Mr. Boomhouer left about 15 minutes later.

36. Counsel for the employer got Mr. Boomhouer to admit that he quit work at the Bancroft IGA in 1993 because he was accused of the theft of a flower, and that he had had other troubles with the law. However, Mr. Chandon did not establish any reason why Mr. Boomhouer, who had not worked at the store in over three years at the time of this incident, would have any reason to make up such a story. Mr. Jerry Michael Howarth, Jr. did not testify.

37. On January 13, 1997 the employer ran an advertisement in the *Bancroft Times*, the local newspaper. In an open letter to the customers of the Bancroft IGA it would appear that Mr. Howarth Sr. (speaking in the first person) made a number of negative comments about the union, Mr. John Fuller, and the people on the picket line. The union's negotiating stance was discussed in a derogatory manner. Mr. Howarth suggested that he was trying to provide jobs, and the suggestion was made that if the employees on strike did not like his store, they could quit and go and work somewhere else.

38. Mr. Vandermeer testified that this advertisement was a major topic of conversation among the employees in the store. Of special interest was that the advertisement disclosed that the employees on the picket line were being paid the equivalent of their regular wages by the union. Mr. Vandermeer and his co-workers concluded that it seemed as though Mr. Howarth Sr. and Mr. Fuller were not seeing eye to eye, and the strike had been going on for two months.

39. During the course of this last set of negotiations Mr. Vandermeer was aware of what was going on in negotiations from Mr. Schramn, the General Manager. At some point in the bargaining he was told by Mr. Schramn that Mr. Howarth was taking a back seat in negotiations, and that Mr. Schramn was in charge of the bargaining. Mr. Vandermeer was aware that negotiations between the union and the employer did not go well between the time of the employer's advertisement, January 13, 1996, and early February. He was having discussions with Mr. Schramn, who was to his knowledge, at that point, the chief negotiator for the employer. Mr. Schramn told him there were stumbling blocks in the negotiations, and that he did not know how long it would go on. He told Mr. Vandermeer that he would try to keep the store open as long as it was possible to do so, but he had no idea how long that would be. Mr. Vandermeer testified that he was told this week to week, and month to month during the strike.

40. On January 21, 1997 the employees of the Bancroft IGA who had crossed the picket line ran an advertisement in the *Bancroft Times*. Ms. Thain felt that since the picketers had been handing out literature to the public, the employees inside the store should say something too. The content of the advertisement was arrived at as a result of Ms. Thain's efforts, and the style was much the same as the employer's open letter to the public, published one week earlier. She put a book in the Bakery department and invited anyone who wanted to, to come and write in what they would like to see in the advertisement. Ten or twelve people contributed to the book, which sat out in the open on the bakery table for a day and a half. Ms. Thain typed the final version, and showed it to Mr. Schramn before

taking it into the newspaper offices. To her knowledge, other management staff, along with staff, may also have read the final draft.

41. She indicated that the text of the open letter is a defence of Mr. Howarth Sr., and that some of the information had come to employees through Mr. Schramn and Mr. Howarth Sr., who had spoken to Mr. Vandermeer. It would appear that Mr. Vandermeer had learned from Mr. Howarth Sr. about the employer's pension proposal made at the bargaining table, and had then gone to the staff and polled them for the employer about whether they would like the employer proposal.

42. There was no discussion with anyone about how the advertisement would be paid for. At the *Bancroft Times* Ms. Thain was told the advertisement would cost about \$250. She takes home \$300 a week for her wages. Ms. Thain did not pay for the advertisement at that time. The bill was later sent to the employer.

43. Although Mr. Schramn says he had no part in the creation of the employee letter published in the newspaper on January 21, 1997, he admits he was given a copy by Ms. Thain to proofread before it was taken to the printer. He believes he was shown the draft because the employees did not want to say anything which would upset management. Mr. Schramn also admitted the employer paid for the advertisement because the bill was sent to the Bancroft IGA. He directed that the bookkeeper take the money to pay the bill out of the coffee money, wherein he claims that by February 1997 there was about \$300. Contrary to Ms. Thain's evidence that Mr. Schramn told her the employer was paying the bill for the advertisement, initially Mr. Schramn testified that he did not discuss the issue of the bill payment with Ms. Thain, or the other employees who had paid \$1 per day into the coffee fund. However, later in cross-examination he changed his evidence and said he had told Ms. Thain the employer would pay the bill.

44. Mr. Fuller received the *Bancroft Times* January 21, 1997 edition and saw the employees' open letter to the community. He testified that the union did not give the strikers the detailed information about negotiations which is reflected in the advertisement. The union had no contact at all with those crossing the picket line, so whatever information those employees had, they were not getting from the union. He was of the view that someone in management, from the employer bargaining team, had to have disclosed to the authors of the advertisement some of the intimate details of the negotiations.

45. Mr. Vandermeer was one of the employees involved in drafting the material for the January 21, 1997 advertisement run by the employees of the store who had crossed the picket line. He indicated that Mr. Schramn and Mr. Howarth Sr. would tell him what was happening in negotiations because he would ask them. Regarding the issue of the pension plan, Mr. Howarth Sr. indicated to Mr. Vandermeer that he had better options than what the union was suggesting, and told Mr. Vandermeer what those options were. Mr. Vandermeer then canvassed the employees in the store about their preferences, and relayed the results to Mr. Howarth Sr.

46. Being the grocery department manager, Mr. Koppin stated he is looked upon as a leader in the store, so he took it upon himself to get the decertification started. He was very vague about how he first got Mr. Chandon's telephone number (counsel for the Bancroft IGA). At first he claimed it had been on Board postings around the store. Then he claimed that as he had some access to the management offices, and others did not, that he *may* have slipped into Mr. Howarth Sr.'s office and got the number from his desk. However, he was adamant that he did not speak to management to get the phone number. He admits there were no meetings held wherein store staff decided that he, or the applicants, should spearhead this campaign.

47. In the middle of January 1997 Mr. Koppin called Mr. Chandon and explained that he wanted to decertify the union at the Bancroft IGA. He was advised that Mr. Chandon, as the employer's

counsel, could not assist him. Mr. Chandon gave Mr. Koppin a telephone number for Mr. Sevigny, a lawyer based in Ottawa. After a number of phone calls back and forth, Mr. Koppin was able to connect with Mr. Sevigny. Mr. Koppin made all his phone calls to the lawyer from his home, and had Mr. Sevigny call him back at home.

48. According to Mr. Koppin, Mr. Sevigny sent a number of copies of the petition to Mr. Koppin's home with a cover letter. After Mr. Koppin got the petitions sent to him, he showed them to Ms. Thain and Mr. Vandermeer, who he had decided could be trusted to participate in the decertification. He never told anyone else what he was doing. As Mr. Vandermeer had some concerns about the petitions, Mr. Koppin arranged a meeting with Mr. Sevigny in Bancroft. The meeting involved Messrs. Sevigny, Vandermeer, and Koppin, and Ms. Thain. Following that meeting Mr. Koppin says he dropped out of the process and was no longer involved because of a concern that Mr. Koppin may be perceived of as management. As subsequent events suggest, Mr. Koppin did not in fact "drop out of the process" at all.

49. Once Mr. Koppin made contact with Mr. Sevigny, Mr. Vandermeer was surprised at how quickly the termination process was put in motion. He had expected that he and Mr. Koppin would meet with a lawyer, but Mr. Koppin went ahead without consulting Mr. Vandermeer. Like Ms. Thain, Mr. Vandermeer claimed at first that he could not recall when the meeting with Mr. Sevigny took place. However, Mr. Vandermeer later indicated that the meeting took place on February 20, 1997. At that meeting at Mr. Vandermeer's home, they decided that Mr. Koppin should bow out of the decertification process because he might be perceived of as a part of management. (Like Ms. Thain, Mr. Vandermeer indicated that Mr. Koppin is in charge of the grocery store on some Sundays.) Mr. Vandermeer's recollection, contrary to Mr. Koppin's testimony, is that Mr. Sevigny brought the petitions to the meeting and gave them to the applicants.

50. At no point can Mr. Koppin ever recall actually retaining Mr. Sevigny as his lawyer, or as the lawyer for the applicants. He says they "never really hired him". He is not sure how it is that Mr. Sevigny is acting for the applicants at this hearing as he is not aware of any of the applicants having hired Mr. Sevigny. He never gave a thought to who will be responsible for paying for Mr. Sevigny's services and he cannot recall any discussions with Mr. Sevigny at any point about payment for the decertification application. He has never been asked by Mr. Vandermeer, or anyone else, to share in paying for the cost of this application.

51. Mr. Vandermeer says he knows what Mr. Sevigny's hourly rate is, and that he was told that rate in Ms. Thain's presence at the meeting. Interestingly, Ms. Thain claims she knows nothing about what the cost of this litigation could be. Mr. Vandermeer has not signed a retainer for Mr. Sevigny's services, and has never sent or received any correspondence from Mr. Sevigny. He has made phone calls to Mr. Sevigny both from the Bancroft IGA office, and from his home.

52. Ms. Thain has never received a letter confirming any client relationship with Mr. Sevigny's law firm in Ottawa, Burke Robertson. At the meeting at Mr. Vandermeer's home, Mr. Sevigny indicated that the applicants could deal with the issue of payment for his services at the end. Ms. Thain has never been to Mr. Sevigny's office, and has never mailed or faxed anything to him or received any correspondence from him. In August 1997, just prior to the commencement of this hearing, Ms. Thain called Mr. Sevigny for the first time when she received a summons from the union. She has no idea what the cost of this litigation may be and indicated that the applicants had not received any interim bills from Mr. Sevigny although since the commencement of this matter there had been legal services rendered for the filing of the application, and attendance of counsel at hearings in Toronto since March 1997.

53. Ms. Thain states that a number of employees had indicated to her that they would help to pay for the costs of the application. This matter arose early on in the discussions at coffee and lunch time as some employees asked how they were going to pay for the decertification. No funds have ever been collected or pledged, and there has been no further discussion about payment of legal fees since May 1, 1997, when the strike ended. With respect to the legal cost of the termination application, Mr. Vandermeer told employees he did not know what the final cost of the application would be, but that he would find out at the end of the process. He never asked any employee for a contribution towards the legal costs, although some employees offered to help to defray the costs. He has seen no interim bill from Mr. Sevigny regarding this proceeding.

54. Ms. Thain was asked about who was paying for her attendance at the hearing into this matter and indicated that she is taking banked days off. She claims she is paying for her own hotel room, which costs \$112.00 per night, and for her meals. Her co-applicant, Mr. Vandermeer, is paying for the gas for the drive from Bancroft, for parking, meals, and for his own hotel room, at the same rate of \$112 per night. By August 1997, when Ms. Thain was testifying, she had still not paid off her credit card bill for the hotel charges for the first set of hearing days in March.

55. Mr. Vandermeer was asked if he was expecting anyone to reimburse him for the costs of this proceeding and his travel down to the hearing days. Mr. Vandermeer indicated he did not expect to be reimbursed. On August 26, 1997 he was nevertheless able to produce his gas receipts from March 1997, and his hotel receipts for the hearings held in that month. He could not explain why he was keeping these receipts.

56. The day after the meeting with Mr. Sevigny, Ms. Thain told her co-workers in the store about the meeting, and began to collect signatures on the petition. Ms. Thain met with most of the employees she signed up individually. She told them she needed a number of signatures to see if there was enough interest in decertifying the union, and explained to them what Mr. Sevigny had told her. To her mind the meeting with Mr. Sevigny was not meant to have been a confidential one. When having her discussions with the employees Ms. Thain cannot be certain that no management personnel were around. She claims she tried to do most of the petition signing on her breaks and lunch hours. Only one or two signatures collected by her were apparently done during working time. Ms. Thain would call employees into the Bakery area where she worked and talk to them there while on her lunch hour. Only one employee who Ms. Thain approached refused to sign the petition. Once the petitions were signed, Ms. Thain gave them to Mr. Koppin, who she assumes sent them on to Mr. Sevigny. She never told other employees that Mr. Koppin was involved in the campaign, or would see the petitions, but did tell potential petitioners that no management persons would know who had or had not signed.

57. Debbie Bowers, another store employee, also collected signatures for the petition. Ms. Bowers did not testify at these proceedings. Interestingly, although Ms. Thain was one of the organizers of the termination application, she did not know how many employees were in the bargaining unit when she began to circulate the petition for this application. Mr. Vandermeer collected signatures on the petitions, and anyone he asked agreed to sign. He gave his petitions either to Ms. Thain, or directly to Mr. Koppin, who he believed couriered all of the petitions to Mr. Sevigny's office in Ottawa. Mr. Vandermeer can only recall that he told a few people that Mr. Koppin was involved in the termination campaign, and indicated that it was possible that some employees may have seen him give the petitions to Mr. Koppin.

58. Mr. Koppin had a list of all of the employees in the store, he collected the petitions from the applicants and Debbie Bowers, and later couriered them to Mr. Sevigny. He was given the petitions at the store. Mr. Koppin and Mr. Mountney, the Store Manager, share a desk in the upstairs office. Mr. Koppin never had any further contact with Mr. Sevigny. It took the applicants about five or six days to

collect the signatures, which Mr. Koppin then sent off immediately. The termination application was filed promptly thereafter by Mr. Sevigny on February 27, 1997, and received at the Board the day after.

59. Once the Labour Relations Board had set a vote date, Ms. Thain went around to tell people of what the vote was for, and when and where it would be held. On the day of the vote, held at the Sword Inn approximately .5 kilometres away from the store, a shuttle service was set up to take employees to and from the poll. Ms. Thain has no idea who set up this service for employees, but is aware that Messrs. Maloney and Koppin, along with a cashier, ferried people back and forth. Mr. Koppin drove employees in the General Manager's truck.

60. On the day of the decertification vote Mr. Koppin was scheduled to work from 7 a.m. to 4 p.m. During his work time he went into Mr. Schramn's office, got Mr. Schramn's vehicle keys, and went to pick up a part-time student to take him to the vote. The drive took between a half hour and 40 minutes. Mr. Schramn had told Mr. Koppin previously that he could use the vehicle whenever he wanted so long as it was back when Mr. Schramn was ready to leave the store. Mr. Schramn testified that he knew that his vehicle was borrowed that day as he recalls that Mr. Koppin asked him if he could use it and he agreed. This is contrary to Mr. Koppin's evidence that he simply took the keys for the vehicle without Mr. Schramn's knowledge. Mr. Schramn claims he did not know what the truck was borrowed for. He asked no questions.

61. Mr. Koppin had told the part-time employee that he needed the employee's vote, and would arrange to have get him into town. Mr. Koppin is the employee's immediate supervisor. He took the employee into the Sword Inn, where the vote was being held, waited in the hallway for him, and then took him back to the grocery store at about 4:30 or 5 p.m. Before returning Mr. Schramn's vehicle, Mr. Koppin did not worry about refilling it with gas.

62. Mr. Koppin had got the phone numbers of most of the store employees from the employer's records which are kept in his office area. He had personally spoken to each of the five part-time grocery clerks under his supervision and had told them he wanted them to get out and vote. He told them if they had any trouble getting in to do so, he would take care of them.

63. According to Mr. Koppin, and contrary to Ms. Thain's evidence, Mr. Koppin and Ms. Thain had set up a system for ensuring that employees would get to the polling station. Mr. Koppin had to stay near the phone during the voting hours so that if Ms. Thain called with the name of an employee who had not yet voted, he would phone the individual and get them to go and vote. The applicants and Mr. Koppin had a list of the store employees from which they worked.

64. On the day of the termination vote Mr. Vandermeer was supposed to work from 8:30 a.m. to 5:30 p.m. However, he clocked out at 3 p.m., and claims he made up the time lost at some other point. Ms. Thain and Mr. Vandermeer believe that the vote was held from 3 to 6 p.m. (According to the Board's records and the testimony of the union's scrutineer, the vote was held between 3:30 and 6:30 p.m.) He was the scrutineer for the applicants. Like Ms. Thain, Mr. Vandermeer says he was not involved in setting up the transportation system for employees to and from the poll. He concedes he did discuss with Harold Maloney the possibility of providing transportation for the part-time students who work at the store. The vote site was only two blocks from the store, but Mr. Vandermeer does not think any employees had to walk to the poll.

65. After the vote had been held and the poll closed, when the Board Returning Officer handed out envelopes with the vote reports for each of the parties, he gave one to Mr. Vandermeer to give to Mr. Sevigny. However, Mr. Vandermeer had no idea who Mr. Sevigny was, until Gail Lyle, the union scrutineer, told Mr. Vandermeer that Mr. Sevigny was apparently the applicants' lawyer. At the hearing Mr. Vandermeer suggested he had just forgotten his counsel's name that day.

66. Shortly after the poll closed both applicants recall that they returned to the store and were let in by Mr. Ed Sturgeon, the employer's scrutineer, who was also returning from the vote. They came to the store to meet with Mr. Koppin, and to a place where they claim they were comfortable and would be private. Mr. Koppin had finished work much earlier but waited until after the store was closed for the applicants to arrive. The three people went to the Bakery area, spread out their respective lists, and discussed voter turn-out. Having compared lists they felt good about how the vote had gone and believed that the majority of employees they were interested in had voted. Mr. Vandermeer claims he did not see Mr. Schramn in the store until 15 or 20 minutes after the applicants returned into the store. He also saw Mr. Mountney at the store and told him the vote had gone well and that there had been a good turn-out. Mr. Koppin left the store about one hour later, and Ms. Thain left the store at around 8 p.m.

67. Following the poll closing, and contrary to the evidence of the applicants, Mr. Schramn testified that he was near the front door when Mr. Vandermeer and Ms. Thain returned to the store at some time after 6 p.m. He believes he either let them into the store, or that the door was still open. They told him they were there to meet with Mr. Koppin. It would not have been typical for employees to come to the store after the store was closed as, to deter theft, it is standard grocery industry policy not to allow employees into the store after closing. Mr. Schramn was of the view that since these two employees wanted to see Mr. Koppin, and since Mr. Schramn was himself present, that they could come in. He could not imagine what Mr. Koppin would still be working at 45 minutes after the store was closed. Mr. Schramn testified that he went to clean out the back room as he was expecting a shipment of an order that night.

68. After meeting with Ms. Thain and Mr. Koppin, Mr. Vandermeer went by Mr. Schramn's office and discussed the termination vote with him. He told him about the voter turn-out, and that there had been two part-time employees who had not come out to vote but who had been working in the store during the strike and on the day of the vote. He told Mr. Schramn the identity of the two individuals. Mr. Vandermeer informed Mr. Schramn that the applicants felt good about the voter turn-out and felt that they had obtained a majority vote.

69. Mr. Schramn does not recall whether Mr. Vandermeer came to his office to talk to him about the vote, or whether he spoke to Mr. Vandermeer at the coffee area. In any event, he cannot recall what they talked about. He admits he was curious about the voter turn-out, and agrees that Mr. Vandermeer may have told him about the part-time employees who did not vote. It is unclear why he would need Mr. Vandermeer to tell him about the voter turn-out since Mr. Sturgeon, his Assistant, had been the employer's scrutineer at the vote, and had also returned to the store following the vote. Mr. Schramn agreed that Mr. Vandermeer appeared to want Mr. Schramn to know how the vote had gone. He had no idea how long the applicants and Mr. Koppin remained in the store. He went home for dinner and when he returned they were gone, but Mr. Sturgeon was still there.

70. Gail Lyle is a part-time cashier at the Bancroft IGA who has worked there for eight years. She was on the union negotiating committee in the last round of negotiations and was on the picket line during the strike. On the day of the termination vote Ms. Lyle observed that there was more staffing of the store than was normal for a Tuesday. On a regular Tuesday there would have been between two and three persons on cash. However, on the date of the vote there were between four and six cashiers at the store. Ms. Lyle observed them going into the store in their uniforms. Mr. Chandon suggested to Ms. Lyle that it was possible that the cashiers were going into the store for a staff meeting. While she agreed that she had no idea what they were going into the store for, Ms. Lyle testified that in her eight years at the store, there has never been a staff meeting requiring the presence of all cashiers.

71. On the day of the termination vote, March 11, 1997, Mr. Schramn claims there was only one more employee than usual scheduled for a Tuesday. Looking at a six week time frame spanning the period before and after the vote Tuesday, Mr. Schramn indicated that there were between 25 and 26 employees scheduled on each Tuesday. He could not however adequately explain why the employees who were scheduled had worked unusual hours on that day. The union cross-examined Mr. Schramn on some examples of cashiers and others who worked that day. It would appear from the employer's records for the week ending March 15, 1997, that Wendy Hein was scheduled to work till 1:30 p.m. every day except on March 11th, when she was scheduled to work until 3:30 p.m. which was when the vote commenced. In the week previous, Ms. Hein had been scheduled to work every day until 1:30 p.m. Mr. Schramn testified that he did not know why Ms. Hein had been scheduled in this manner, but indicated she was being trained during that time period. It is unclear what Ms. Hein was being trained on as, according to the seniority list, she has been working for the employer since October 16, 1987, and is listed as a cashier.

72. Denise Lalonde was scheduled to work every Tuesday until 1:30 p.m. However, on the day of the vote she was scheduled to work until 3:30 p.m. The following Tuesday, Ms. Lalonde was again only scheduled till 1:30 p.m. The same occurred with respect to Barbara Carr. Lisa Parks was never scheduled on a Tuesday in the five weeks of schedules produced by the employer. However, on the date of the vote, Tuesday March 11, she was scheduled to work. In the week following, Ms. Parks was not scheduled on Tuesday. Mr. Schramn's explanation was that there was an employee on vacation that week. It is unclear why, if one employee was on vacation that week, so many people had to work extra time on the same day of the week. Joanne Trotter is off every Tuesday, however on the day of the vote she worked from 1:30 to 6 p.m. Danielle Gorgerat is always off on Tuesdays, but on that Tuesday she worked. Mr. Schramn suggested that shifts may have been changed to meet employee requests.

73. In the meat department Kevin Woodcox was scheduled to work on the Tuesday even though he never usually works on Tuesdays. Mr. Schramn suggested this may have been because Mr. Vandermeer, who also works in the meat department, was off that day. However, Mr. Vandermeer testified that he worked on the day of the vote.

74. In the bakery department Mahogany Boyle was scheduled to work although she never worked on Tuesdays. Mr. Schramn indicated that Allyssa Miles was off work that day so that Ms. Boyle would have been scheduled. This is at odds with the schedules of employees which the employer had provided to the Board with its response to the termination application: In the Board's review of Schedule "C" of the lists the employer provided, it indicates that Ms. Miles had been laid off for lack of work on October 18, 1996 and that there was no known return to work date.

75. Doris Schenkel, a store clerk, never usually worked on a Tuesday, but worked on the Tuesday of the vote. Jacob Dahl, who worked as a store clerk in customer service, never usually worked on a Tuesday, but on that Tuesday was scheduled to work from 3:30 p.m. on. Mr. Dahl voted at 3:35 p.m. Mr. Schramn had testified that no employees went to vote on work time. With respect to Mr. Dahl he could not explain how this employee could have got a break within five minutes of starting his shift.

76. Mr. Schramn testified that he had nothing to do with the scheduling of all of these people to work on the date of the termination vote. He indicated that the department managers must have done the scheduling. However, it had been Mr. Koppin's evidence that as the grocery department manager he did *not* control scheduling, but Mr. Sturgeon did. According to Mr. Koppin Mr. Ed Sturgeon, who is the Assistant Store Manager, a member of management, and was the employer's scrutineer at the vote, controls the scheduling of employees.

77. Mr. Schramn testified that he was not aware of the termination campaign or application until he received a copy of the application. He states that he did not offer the applicants the name of a

lawyer, or to assist Ms. Thain and Mr. Vandermeer in the filing of the application. When asked how it was that Ms. Thain had said that everyone in the store knew about the campaign, but that he did not know, Mr. Schramn indicated that the campaign must have been kept a secret from him. He testified that employees cannot take their breaks or lunches on the retail floor. This is at odds with Ms. Thain's evidence that she called employees into the Bakery on her breaks or lunches to sign the petition.

78. When questioned about his relationship with Mr. Vandermeer, Mr. Schramn indicated it was a normal working relationship. However he indicated that when Mr. Vandermeer asked him about negotiations and matters being dealt with at the Board, he would tell him what was happening. On December 4, 1996 Mr. Vandermeer asked Mr. Schramn what was stalling the negotiations and was told that the union was stalling. (This was based on information Mr. Schramn had received from Mr. Howarth Sr. as Mr. Schramn was not himself attending the negotiations at that time.) Mr. Vandermeer and Mr. Schramn then walked out to the picket line together and Mr. Vandermeer told one of the strikers that Mr. Schramn was ready to negotiate any time the strikers wanted. Mr. Schramn told the picketers that the union was refusing to negotiate. The strikers questioned Mr. Schramn's authority to negotiate, but told Mr. Schramn that he should speak to Mr. Fuller. Mr. Schramn told the picketers he was capable of bargaining, and he and Mr. Vandermeer then returned into the store. Mr. Schramn suggests that it was just coincidental that he and Mr. Vandermeer went out to speak to the picketers.

79. With respect to Mr. Vandermeer having been the witness for Mr. Schramn's posting of the Board's notices in December 1996, Mr. Schramn said coincidentally he had been the employee at hand, and had therefore signed the posting. He confirmed that the employer had made no other postings in the workplace previously, and that Mr. Chandon's name was not on the December posting. He could not recall when Mr. Chandon had become involved in the Board matters for the employer. This evidence confirms that Mr. Koppin could not have got Mr. Chandon's phone number from the Board postings in December 1996 or January 1997.

80. When asked about Mr. Vandermeer's apparently free access to the General Manager's office, Mr. Schramn indicated other employees also had access to it: Mike Klein used the telephone to place his milk orders; Jerry Michael Howarth and Harold Maloney also used it to place orders. Mr. Schramn confirmed that Mr. Koppin had been very fearful of going to the General Manager's office because he had been intimidated in the past by Mr. Howarth Sr. He did not explain how Mr. Vandermeer had been permitted to make personal long-distance calls from Mr. Schramn's office.

81. When asked about his ability to make long-distance telephone calls to Mr. Sevigny from the workplace, Mr. Vandermeer indicated that there was an open-door policy at the General Manager's office since Mr. Schramn took over, and that *any* employee can use the telephone in that office. Later in cross-examination Mr. Vandermeer retracted this latter comment and admitted that *he* had been told he could make phone calls from the General Manager's office, and that all employees were not told this. Mr. Vandermeer started to make calls to Mr. Sevigny around the time of the filing of the termination application, and continued to make them in the months after the filing. He would go into the office and indicate to Mr. Schramn that he had a personal call to make, at which point Mr. Schramn would leave to allow him to use the office to call Mr. Sevigny. On at least one occasion Mr. Vandermeer told Mr. Schramn he wanted to call the lawyer, and Mr. Schramn permitted him to do so. Mr. Vandermeer has never been asked to reimburse the employer for the long-distance calls he made during the store's business hours. At any time after the filing of the application, if a question came up, Mr. Vandermeer would go to the office and call Mr. Sevigny for clarification. Mr. Sevigny would call Mr. Vandermeer back at the store, and Mr. Vandermeer would take those calls either in Mr. Schramn's office, or in the upstairs office of Mr. Mountney, Mr. Koppin, and the bookkeeper. On one or two occasions Mr. Vandermeer told his co-workers that he was calling Mr. Sevigny from the store. A number of the calls

were made during Mr. Vandermeer's working hours, while others were made while he was on his breaks.

82. Unlike Mr. Vandermeer, Mr. Koppin indicated that staff could not just go into the General Manager's office and make long-distance phone calls. He indicated that staff were afraid of Mr. Howarth Sr. and since Mr. Schramn and Mr. Howarth Sr. shared an office in January 1997, employees would not believe it was acceptable to just walk into the General Manager's office to use the telephone. Even under Mr. Schramn, Mr. Koppin was of the view that employees could not take such liberties.

83. Prior to the strike commencing Ms. Lyle was never permitted access to the General Manager's office to make a phone call. Staff were told to use the pay phone in the lobby of the store. To her knowledge, even after the strike was over, no employees could use the General Manager's office telephone. Further, no person who was on the picket line has ever been allowed to drive Mr. Schramn's truck.

84. In February 1997 Mr. Schramn recognized that Mr. Fuller was not confident that Mr. Schramn had the authority to negotiate for the employer. At that point, although he did not tell Mr. Fuller this, Mr. Schramn was the President of a numbered company which had an interest in the store and Mr. Howarth Sr. was still the President of Banlake Associates, which owned the store. Mr. Howarth Sr. had financed Mr. Schramn's company's purchase of the Bancroft IGA. Mr. Schramn therefore asked Mr. Howarth Sr., who was in Florida, to write a letter confirming that Mr. Schramn had negotiating authority. This was done on February 11, 1997, and faxed to the union and the conciliation officer. On February 12, 1997 the union responded, indicating it was ready to meet any time, and reiterated that the services of a mediator were available to the parties. No negotiations in fact occurred until April, after the termination application and vote had been held.

85. After the vote had been held in the decertification application Mr. Fuller heard that Mr. Chandon was now going to be negotiating for the employer, along with Mr. Schramn. However, dates for negotiations were not set until April, when the parties met on four occasions and reached a memorandum of agreement. Mr. Howarth Sr. never returned to the negotiations after January. In April a deal was reached on the four key items the union had identified back in January 1997. In Mr. Fuller's view, the employer simply did not want to reach a deal in January, but by April, the termination vote had been held, the summer busy season was approaching, and the employer did not want the strike carrying on once the seasonal shoppers arrived. A ratification vote was held on May 2, 1997 and a new collective agreement was ratified. Both the strikers and those who had crossed the picket line voted at that ratification meeting.

ARGUMENTS

86. It is suggested by the union that the termination applicants could not have been sophisticated enough as to have so skillfully applied for decertification using an unusual section of the Act. This application is not made under section 63, the general termination of bargaining rights provision, but under the more obscure section 67. Section 67(2)(a) of the Act, which applies in this instance, states:

67. (2) Where notice has been given under section 59 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made.

- (a) at least 12 months have elapsed from the date of the appointment of the conciliation officer or a mediator; ...

87. Given this relatively complex provision, the union asks how the applicants could have had knowledge of the date of the appointment of the conciliation officer, except through the employer? The union points out that the termination application was timely by *four days*, and that the termination applicants were successful in making their application on their first attempt. Only the union and the employer would have received a letter regarding the appointment of the conciliation officer. The conciliation officer was appointed on February 23, 1996. This application was filed on February 28, 1997.

88. Relying on the evidence the union also argues that the employer breached section 63(16) by its conduct from the summer of 1996 up until the initiation of the termination application, and by its actions leading up to the representation vote in the termination application on March 11, 1997. The union suggests that the employer created an environment in which it anathemized the union and then encouraged the initiation and support of an application to decertify the union.

89. The applicants argue that the union has not met the onus of establishing a breach of section 63(16) of the Act, and that the ballot box should therefore be opened and the ballots counted in this application. Counsel asks the Board not to draw the inferences from the evidence which the union has asked us to draw, but rather to simply accept at face value the evidence of Messrs. Vandermeer and Schramn and Ms. Thain. Even if the Board finds that there was employer involvement in the initiation of the application, the applicants ask the Board to consider whether that was sufficient to prevent the employees from expressing their true wishes through the vote process. In their view it was not, and the votes should therefore be counted.

90. The employer argues that the “grand conspiracy” which the union is alleging in this application has to have a connection to the termination application. It argues that the union’s case is circumstantial and that the Board should not accept the union’s theory of what took place. In any event, the employer suggests that Mr. Schramn was not a part of the alleged employer course of conduct. The employer asks the Board to find that the evidence falls short of being conclusive that the management of the Bancroft IGA orchestrated this application, or that it acted in any way contrary to section 63(16).

DECISION

91. In this case, given that the union had made a number of allegations and had claimed that there had been breaches of section 63(16), the Board held a representation vote in the termination application, but sealed the ballot box. The union alleges that there has been a concerted effort made by the employer to initiate and direct the co-ordination of an application for the termination of bargaining rights. Section 63 of the Act is the general provision addressing applications for the termination of bargaining rights. Section 63(16) states:

Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

92. With the 1995 amendments to the *Labour Relations Act*, the Board is no longer required to conduct an inquiry into the voluntariness of an application for termination of bargaining rights prior to the taking of a representation vote. Similarly, the Board is not required to inquire into the inception of the petition signed by employees, or the circulation and handling of that petition prior to the application being made. However, where there are allegations made which engage section 63(16) of the Act, the Board must determine whether the evidence before it establishes that an employer or person acting on behalf of the employer initiated the application, or engaged in threats, coercion or intimidation in

connection with the application. If the Board is satisfied that there has been such improper employer action, the Board has the discretion to dismiss the application. (See *Elirpa Construction and Materials Limited*, [1996] OLRB Rep. Jan. 4, at paras. 13 and 14).

93. In *Bytown Electrical Services Ltd.*, [1996] OLRB Rep. Sept./Oct. 721, the Board reiterated that the voluntariness of the petition is no longer a crucial consideration in determining the validity of a termination petition. It went on to state that the onus is on the union to establish that the termination application has been initiated by an employer. In reaching its determination in respect of section 63(16), the Board stated it would consider the following:

107. ... The inquiry into voluntariness focused upon the circumstances of the signing of a petition, the current inquiry focuses upon the launching of the application. The focus is not restricted to the signing of the petition and includes the bringing of the application. In most cases this will be a distinction without a difference, but in some it may be significant.

108. Under subsection 63(16) of the Act, if a termination application is initiated by the employer, the Board has a discretion to dismiss it. The reason for this provision is that if a decertification application is really caused by or originated by the employer, and it is not primarily the conception of the employees who make the application, then it represents an improper interference by the employer in an area which should properly be within the exclusive terrain of the employees. Initiation involves causing, originating or facilitating, the beginning of a process or event. What meaning should the concept, "initiation", be given in the context of section 63 of the Act? Plainly if an employer prepares a petition to terminate a union's bargaining rights, summons his/her employees and requires them to sign the petition and then requires an employee to initiate a termination application, the employer initiates the decertification application. But that is an extreme and, hopefully, rare manifestation of improper employer interference in the contemplated process of employees freely deciding of their own initiative that they no longer wish to be represented by a particular, or perhaps any, trade union. Such direct, palpable initiation will in all likelihood be an unusual occurrence. But initiation can also occur indirectly, less palpably than in the example suggested, though no less effectively. There are gradations of employer conduct in relation to a termination application, along a spectrum, part of which will be improper and part of which will be acceptable behaviour. The Act determines that when an employer "initiates" a termination application, the Board has a discretion to dismiss the application. There is a continuum of employer conduct, some of which will amount to "initiation" some of which will not. How then is the distinction to be drawn?

109. We consider that the proper interpretation of the notion of "initiation" is to determine whether the employer's conduct amounted to significant or influential employer involvement giving rise to the termination application. In other words, if the application is founded in the conduct of the employer, then it can reasonably be concluded that the employer has initiated that application.

94. In that case the Board assessed the credibility of the witnesses, evaluated the circumstantial evidence, and drew reasonable inferences from what was before it. The Board found that the owner of the company, whether advertently or inadvertently, had created a climate of antagonism among his employees against the union and had fostered a concern about job security; had, through insidious inducement undermined the presence of the union in the company; had changed the method of payment of some benefits so that he directly dealt with the employees rather than going through the bargaining agent; and had created an environment in which no credit for benefits could be given to the union. The Board found that the employer had "engaged in a process of anathematization against the union which created an environment among his employees which had the effect of undermining their association with the union" (see para. 110).

95. In *Bytown* the Board found that there had been a breach of section 63(16) of the Act, and went on to consider whether, in the exercise of its discretion, notwithstanding the employer's initiation of the application, the true wishes of the employees may yet be ascertained in a termination ballot. The Board found that it should dismiss the termination application, and stated that:

115. The purpose of subsection 63(16) is to prevent the mischief described therein. A termination application founded in the employer's initiation should result in its dismissal unless there are compelling labour relations reasons why, notwithstanding the employer's initiation of the application, a Board-supervised secret ballot should still be held. ...

96. Launching of the termination application, especially signing of the petition by employees, was the focus of *Tenaquip Limited*, [1997] OLRB Rep. July/August 742. While the Board relied upon *Elirpa* and *Bytown* (cited above), it also developed further the Board's approach in cases where the union has claimed a section 63(16) breach by an employer. Thus, at para. 19 of the decision in *Tenaquip*, the Board noted that an applicant in a termination application is no longer typically required to persuade the Board that employee perceptions of management involvement in the application have not undermined the voluntariness of the petition. Further, the Board will now be more concerned with actual, not perceived, employer involvement in termination applications. While the Board reiterated that the union bears the onus of proving that there has been improper employer action, it also noted the following:

22. ... By its very nature, (the hopefully rare instances of) covert employer initiation of a termination application is unlikely to be an easy matter for a union to affirmatively and directly establish. And, while the onus is clearly upon the union, the Board does recognize that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement. An employer who chooses to call no evidence in the face of such circumstantial evidence obviously does so at its peril.

97. In discussing the impropriety of employer involvement in termination applications, the Board noted:

26. This Board has historically been acutely sensitive to the delicate and responsive nature of the employment relationship. As the Board observed over four decades ago in the oft-cited case of *Pigott Motors*, 63 CLLC 16,264:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

27. The Board went on in that case to cite the concern and the fact that, in the Board's experience, employers in a "not inconsiderable number of cases" had improperly inhibited or interfered with the free exercise of employee rights as the basis for the Board's former practice of requiring applicants to establish the voluntariness of petitions.

28. Does the fact that the Board will no longer, as a matter of course, conduct an inquiry into the voluntariness of a petition, mean that all of the Board's historical concerns about the impropriety of employer involvement in termination applications have now completely dissipated? Clearly not. Such conduct may still amount to a violation of section 70 of the Act and improper employer involvement in a termination application may lead to the dismissal of the application under section 63(16).

98. In that case the Board found that the employer had breached section 63(16) of the Act. Factors the Board considered in reaching this decision were that the petitions were solicited during working hours and employees were summoned to leave their workplaces to attend at a boardroom for the purpose of having individual meetings with the applicants. While there was no direct evidence of employer involvement in the process, the Board drew a negative inference from the fact that the employer called no evidence even though two employees, seemingly without employer permission, had been able to use the employer's boardroom. Further, employees had been called off their jobs to come to the boardroom to sign petitions. The Board concluded that at a minimum the employer was aware of what was going on. While not prepared to conclude that employer knowledge was sufficient to ground

a finding of employer initiation, the Board stated that it is necessary to consider not only the nature but also the likely effects of the employer's conduct, and the use and effect to which the employer's resources were put in furthering the application. The Board found:

36. The petitioners made use of company resources in such a fashion as would lead a dispassionate observer or a reasonable employee to conclude that the employer directly supported the application. In the absence of any evidence to the contrary, I too, am driven to such a conclusion. The petitioners' conduct was open and notorious. The employer permitted such conduct and must equally have known that a reasonable employee would have concluded that the petitioners' efforts had the explicit support of the employer. The employer's permission in these circumstances must, more likely than not, have been grounded in its conscious and deliberate wish that employees believe that the decertification application was supported by the employer.

99. The Board was of the view that based on the circumstantial evidence before it, there must have been active cooperation between the petitioners and the employer. The employer had permitted the petitioners' activities, had contributed resources, and through its cooperation with the petitioners, and toleration of their activities on company time, had communicated to employees that it supported the application. The Board found that the effect of these employer contributions at an early and formative stage in the application was both significant and influential in the initiation of the termination application.

100. A review of the evidence in the case before us suggests that there was a course of employer action which began in the summer of 1996 and culminated on the day the termination vote was held in March 1997. That course of action was designed to bring home to the Bancroft IGA employees that the employer was not pleased with the union. After the employees of the Bancroft IGA rejected the employer's final offer in May 1996, the employer unilaterally changed wage rates, pension contributions and the payment of union dues. In our view this was the first indication that summer to employees that the employer was contemptuous of their bargaining agent, the trade union. It would appear that many of the employees understood the tenor of the employer's behaviour, and those who had a personal friendship with Mr. Howarth Sr. picked up the gauntlet. Thus, as soon as a narrowly successful strike vote was taken in June 1996, Mr. Koppin and a number of other employees petitioned the union to hold another vote. This action in and of itself would be unremarkable. However, Mr. Koppin made sure he told Mr. Howarth Sr. about everyone who was opposing the strike vote by supplying Mr. Howarth Sr. with a list of the employees who had signed the petition. In doing so, Mr. Koppin freely used the employer facsimile machine and FAX cover sheets.

101. Although the trade union filed unfair labour practice complaints about the employer's actions, Mr. Howarth Sr. simply did not attend at either the Labour Relations Officer meeting or at the hearings before the Board, further showing his contempt for the union's efforts to protect the rights of the employees. Despite the Board's decision issued in September 1996 finding that the employer had breached the Act, the Bancroft IGA refused to comply with the Board's order. A legal strike commenced in October 1996.

102. It would appear that the employer issued a bulletin as soon as the strike began indicating that it needed the support of its various customers "so management is not forced to close the doors". On October 21, 1996, Mr. Howarth Sr. ran an advertisement in the local Bancroft newspaper identifying by name each employee of the store who had chosen to strike, and denigrating the union and its officials. As noted in the evidence outlined earlier, no bargaining was taking place. By December some employees who had crossed the picket line and were working in the store had become concerned that the store would close if the strike continued. Someone asked Mr. Schramm how they could get rid of the union, and the employees discussed this issue among themselves. However, nothing further came of those discussions.

103. It was only after the Board had issued a second decision ordering the parties to meet and bargain in good faith (December 23, 1996) that the employer appears to have understood that it was perilously close to being found in contempt and agreed to set some dates to bargain. However, when bargaining began on January 2 and 3, 1997, little was accomplished. Although the union had asked the Conciliation Officer to attend in the hope that he could facilitate and mediate the fractious relationship between the union and employer, Mr. Howarth Sr. took umbrage at the Officer's presence. Despite the union's efforts to concede in a number of areas, and to inform the employer of its four major areas of concern, the Bancroft IGA refused to move on any front. The union's view was that the employer was surface bargaining, and when viewed in relation to the rest of the employer's actions up to that point, that may have been a reasonable conclusion.

104. It is Mr. Boomhouer's uncontroverted evidence that on January 10, 1997, Mr. Howarth Sr.'s son told his hairdresser that his dad, the employer, had a trick up his sleeve, and that he was going to get rid of the union with the help of an Ottawa lawyer. Shortly thereafter the evidence is that Mr. Koppin called counsel for the employer and got a name of a lawyer in Ottawa to help with a decertification application. Mr. Sevigny then came from Ottawa to Bancroft and met with Messrs. Koppin and Vandermeer and Ms. Thain. Mr. Koppin claims that Ms. Thain and Mr. Vandermeer were chosen to attend this meeting as they were the ones he felt he could trust. It is unclear what he needed to trust them with as the applicants claim that the vast majority of the employees who had crossed the picket line were all in favour of decertifying the union. According to both of the applicants in this application, and Mr. Koppin, none of them has signed a retainer with Mr. Sevigny, the Ottawa lawyer acting for the employees in this proceeding. Mr. Koppin and Ms. Thain do not even know what Mr. Sevigny's hourly rate is. None of them has seen a bill, or even an interim statement from Mr. Sevigny in the course of this long proceeding. The applicants have made no attempt to collect any pledges or money from any of their work colleagues to pay for this litigation. After the termination vote was held Mr. Vandermeer did not even recognize Mr. Sevigny's name until the union scrutineer reminded him that Mr. Sevigny was supposed to be the termination applicants' counsel.

105. It is particularly odd that although the applicants had apparently spent their own money in March 1997 to attend at a hearing in Toronto, and had incurred such costs that by August 1997 Ms. Thain, who earns less than \$10 per hour, had still not paid off her credit card balance resulting from that trip, the applicants had still not collected any money from their colleagues who they claim are supporting this application. Both Ms. Thain and Mr. Vandermeer were able to produce all receipts for that visit to Toronto. Mr. Vandermeer had no explanation for why he had kept a gas receipt from that March 1997 trip to Toronto but he was able to produce it almost 6 months after the fact. It is implausible that if the applicants are acting on behalf of their fellow employees, and those persons had all agreed that they would jointly cover the costs of the decertification application, that they would not have taken up a collection and paid for their co-workers out-of-pocket expenses incurred to attend at the hearings regarding the termination application. Which leaves the Board with the question of who is paying for and supporting this application?

106. Neither Mr. Howarth Sr. nor Mr. Jerry Michael Howarth, his son, were called to testify so that we do not have the benefit of their evidence. All that we have before us is Mr. Boomhouer's evidence that he heard Jerry Michael Howarth say his dad had something up his sleeve and that they now had a lawyer in Ottawa to assist them in getting rid of the union. There is Ottawa counsel assisting the applicants in this termination application. Finally, there is no retainer with any employee applicant in this case, no applicant has paid any fees to that lawyer, the applicants have not corresponded with that lawyer, and they have not collected any money from their co-workers who are allegedly going to help pay for this litigation. The applicants are however studiously saving all of their receipts from their trips to Toronto. In light of these facts, and in the absence of any evidence to the contrary, we draw the inference that the employer, in the person of Mr. Howarth Sr., the ostensible owner of the Bancroft

IGA during the material time, and/or the Bancroft IGA are financially supporting this termination application.

107. As was noted earlier, the union asks how the applicants could have had knowledge of the date of the appointment of the conciliation officer, except through the employer? The union points out that the termination application was made pursuant to section 67(2)(a) and was timely by *four days*. The applicants were not examined about their knowledge of this salient date, so that there is simply no evidence before the Board from which we can draw any conclusions or reasonable inferences.

108. On January 13, 1997 the employer ran another advertisement in the Bancroft newspaper demeaning the union's negotiation efforts and denigrating Mr. Fuller, the union's chief spokesperson. One week later, on January 21, 1997, after an open and notorious process of collecting information from both employees and management in the store, Ms. Thain also ran an advertisement in the Bancroft newspaper. However, before submitting the advertisement for printing she had Mr. Schramm approve the content. Although her advertisement was ostensibly from the employees who had crossed the picket line, the bill was sent to and paid for by the Bancroft IGA. Mr. Schramm indicated that the store paid for that advertisement out of coffee monies which had been collected in the store during the strike, and therefore he suggested that this was the employees' money. However, that is clearly not the case. The employer supplied coffee because it believed it was difficult for the workers to have to brave the picket line to go out for coffee during the strike, and the employees paid the employer for that coffee. It could hardly be described as the employees' money having been paid to the employer for the employer's coffee and supplies. It is unclear why Ms. Thain would have spearheaded a movement to run the advertisement, find out it would cost between \$250 and \$300 to do so, and then have the employer pay for it. It is equally unclear why an employer would agree to pay this amount of money so that a bakery clerk could run an advertisement. Since Ms. Thain never collected any money from her co-workers to pay for the advertisement, and Mr. Schramm subsequently told her the store was paying, the majority of the Board sees this incident as another example of the employer's assistance in the efforts of the applicants to create a climate of support for the termination application.

109. The manner in which the applicants collected signatures on the petition in support of the termination application suggests covert support by management for the application. The signatures were collected during working hours and while the store was in operation. Ms. Thain in particular appears to have sat in the Bakery of the store and called employees in from the floor to sign the petition. While she claims she was on breaks or lunches, as Mr. Schramm indicated in his evidence, staff are not supposed to take their breaks and lunches on the store floor. Further, even if she was on a break or lunch, all of the employees she called in were not similarly on breaks or lunches - otherwise they too could not have been present on the store floor. From the evidence given by the applicants it appeared clear that there was no stealth involved and that management would have been in a position to know what was going on. Indeed, Ms. Thain honestly admitted that everyone knew what was happening. It is apparent to the majority of the Board that the employer took no steps to ensure that the termination applicants conducted their campaign in non-work time, thus giving its seal of approval to the campaign.

110. Mr. Koppin, who alleges that he was advised not to be an applicant because he may be perceived of as aligned with management, nonetheless maintained a pivotal role in the application. Mr. Koppin is the only department manager who has an office and is the person left in charge of the store when the rest of the management team is not in. The employees in the store were made aware that Mr. Koppin was involved. He got access to an employee list, collected the signed petitions, and then sent them on to Mr. Sevigny in Ottawa. While the applicants did not know when they had got more than 40% of the employees to sign the petitions, as required by the Act, Mr. Koppin apparently knew. Thus it would seem that Mr. Koppin, who had been quick to inform Mr. Howarth Sr. in the summer of 1996 about who had signed his petition at that time, was again and to the knowledge of the employees, put

in charge of collecting all of the termination petitions. The inference to be drawn from these circumstances is that the reasonable employee could have suspected that the knowledge of who was signing the petition would get back to the owners of the store.

111. The events of the date of the vote have been outlined in detail above. A synthesis of the evidence is that management of the store appears to have scheduled employees in such a way that many employees who would not normally have worked on that day, or around the time of the vote, were scheduled to work. Further, employees were taken during work hours to the polling place by Messrs. Maloney (a friend of Mr. Howarth Sr.) and Koppin. Mr. Koppin even used Mr. Schramn's vehicle during working hours to go and get an employee to ensure that employee, who was not scheduled to work, voted. The evidence suggests that the employer provided significant support for the termination application on the day of the vote.

112. In the aftermath of the vote the conduct of the applicants and Messrs. Schramn and Sturgeon is also indicative of the relationship between the termination applicants and management of the store. Mr. Schramn advised the Board that it is the practice in the retail food industry *not* to have employees in the store after it closes so as to ensure that theft is kept to a minimum. However, after the polls had closed either Mr. Schramn or Mr. Sturgeon, or both, let the applicants into the store. It is Mr. Schramn's evidence that he later went home and left them in the store on their own. It is inexplicable to the majority of the Board why these employees had to come back to the store to debrief, and why they were let in by management. The explanation that they were comfortable in the store and therefore returned there defies belief. Why did they not go to one of their three (including Mr. Koppin) respective homes for this purpose? Indeed, why were they not told by management to go somewhere else?

113. In our view, the answer to these questions lies in Mr. Vandermeer's conduct after the applicants and Mr. Koppin had gone over the employee lists to establish the voter turn-out. Mr. Vandermeer went to Mr. Schramn and told him that voter turn-out had been good as far as the applicants were concerned, that there had probably been a majority vote for the application, and he then told Mr. Schramn which two employees who had been working in the store had not attended to vote. The majority of the Board finds that this action is consistent with our view that the management of the store had been instrumental in the initiation and support of this termination application. In our view that is why Mr. Vandermeer felt he should report to the General Manager of the store how the vote had gone, and who had been the recalcitrant employees who had not attended even though they had been at work that day. After that report had been given Mr. Schramn went home for dinner, and when he came back to the store, the applicants and Mr. Koppin had left.

114. The final area of concern to the majority of the Board is the relationship between Messrs. Vandermeer, Howarth Sr. and Schramn which we have concluded also supports a finding that the employer initiated and supported this termination application. Although Mr. Vandermeer was not a part of management, even at the departmental level, Messrs. Howarth Sr. and Schramn appear to have told him a lot about what was going on between the employer and union at the bargaining table prior to the termination application being launched. At the behest of Mr. Howarth Sr. Mr. Vandermeer conducted a survey among the employees about the pension issue and subsequently, as a result of knowledge he had from Mr. Howarth Sr., Mr. Vandermeer contributed negotiation information to the advertisement Ms. Thain penned. At the time of the filing of the termination application, and immediately after it was filed, Mr. Vandermeer was given notorious and liberal access to the General Manager's office. This is clearly a privilege not accorded to any other employees in the store. Mr. Vandermeer could come into Mr. Schramn's office and use his telephone to call the lawyer in Ottawa; he could accept calls from the Ottawa lawyer during work hours in the store; and when necessary, Mr. Vandermeer even asked Mr. Schramn to leave the office so the Mr. Vandermeer could call the lawyer in Ottawa. Even Mr. Koppin,

who is a department manager, testified he did not have this level of access to the General Manager's office.

115. The majority of the Board's review of the evidence indicates that the employer's representatives and Mr. Vandermeer had a relationship which was known to the other employees by virtue of Mr. Vandermeer's polling of employees for Mr. Howarth Sr., by Mr. Vandermeer's ability to contribute information about the bargaining to the employee advertisement, and from the incident of Messrs. Schramn and Vandermeer going out to the picket line to talk to strikers. Mr. Vandermeer's uncommonly liberal access to the General Manager's office was yet another feature of his special relationship to the employer. It appears to us that a strong inference can be drawn from the fact that Mr. Vandermeer became one of the trusted two Mr. Koppin invited to have become the applicants, the lack of a retainer between the applicants and counsel representing them in this proceeding, the open and notorious relationship with management, and the reporting to Mr. Schramn of the turn-out for voting on the date the termination vote was held. In our view there appears to have been a relationship between the employer and Mr. Vandermeer pursuant to which he, along with Mr. Koppin and Ms. Thain, and with the support of the employer, initiated this termination application. We find that the applicants, and particularly Mr. Vandermeer, were acting on behalf of the employer in this regard.

116. In the jurisprudence outlined earlier the Board has considered the concept of "initiation" as including gradations of employer conduct in relation to a termination application, and in particular, whether the employer's conduct amounted to a significant or influential involvement giving rise to the application. We had indicated at the outset of this decision that the Bancroft IGA was a strike-bound store. As the Board has noted in *Tenaquip* (cited above), it may not be an easy matter for a union to affirmatively and directly establish improper employer conduct. However, the Board has been prepared to accept circumstantial evidence which leads to an inference of improper employer involvement. On the balance of probabilities the majority of the Board is satisfied that the union has met the onus of proving that there has been improper employer involvement in this application and that there is a violation of section 63(16) of the Act. On all of the evidence outlined above, we find that the conduct of the management of the Bancroft IGA amounted to significant and influential involvement. We have drawn a negative inference from the failure of either the employer or the applicants to call Messrs. Howarth Sr. and Jerry Michael Howarth to testify. In the absence of any evidence from Mr. Jerry Michael Howarth, and because we are satisfied that Mr. Boomhouer's evidence is credible, we have before us testimony that Mr. Howarth Sr. may have been planning to get rid of the union and had hired a lawyer from Ottawa. The facts are that the employer's counsel is from Toronto, the applicants' counsel is from Ottawa, but there is no evidence that the applicants have retained that counsel.

117. We heard no alternate theory to that put forward by the union, that the employer had masterminded the termination application; that Mr. Koppin, who was closely associated with Mr. Howarth Sr., had initiated the process and got the name of the Ottawa counsel from the employer's counsel; he then picked two employees he believed could be trusted with the enterprise, one of whom had a close relationship with both Mr. Howarth Sr. and with the general manager, Mr. Schramn; the employer facilitated the collection of names for the petition launching the application; it then permitted Mr. Vandermeer to have open access to the general manager's office to make phone calls to, or receive phone calls from, the lawyer in Ottawa; the employer then scheduled a number of employees so that they would be working around the voting hours and employees were allowed to go and vote during working hours; the general manager's vehicle was used by Mr. Koppin to go some distance to pick up an employee who was not scheduled to work that day so that that employee could cast his ballot; after the vote the employer let the applicants into the locked store and allowed them to do their de-briefing there; and finally, Mr. Vandermeer reported to Mr. Schramn on the turn-out for the vote.

118. The evidence before us has already been outlined, and the inference we have drawn from that evidence is that the employer is behind the termination application and that there was active cooperation between the applicants and the employer. The majority of the Board finds that the effect of the employer contribution from an early stage, and indeed up until the holding of the vote, was significant and influential with the many employees in the bargaining unit who had crossed the picket line. As has been noted earlier, the Board has recognized that employees are particularly vulnerable to influence by the employer, and that that influence, whether overt or more subtle, may operate to impair the free exercise of employee rights under the Act. In the case before us, the employees who had crossed the picket line to work were in a particularly sensitive position as they were plagued with concerns about their job security. Further, Mr. Howarth Sr. created and fostered a climate of antagonism against the union and, by negotiating directly with the employees in the store, undermined the presence of the union at the Bancroft IGA. This would appear to be a classic case of employees wanting to appear to identify with the wishes and interests of their employer, and their employer using its position and resources in furtherance of a termination application.

119. The Board has a discretion as to whether it should dismiss the termination application having found it was initiated and supported by the Bancroft IGA. In exercising that discretion the Board considers whether or not, notwithstanding the employer's initiation of the termination application, the true wishes of the employees may be ascertained in a termination ballot. We agree with the Board's statements in *Bytown* (cited above) that a termination application founded in the employer's initiation should result in its dismissal unless there are compelling labour relations reasons for why a Board-supervised secret ballot vote should still be held.

120. In this case there were no such reasons suggested. The applicants are simply of the view that the ballot box which was sealed when the vote was taken on March 11, 1997 should be opened and counted. We have already found that there was improper employer involvement in the application, and the events leading up to that vote. We cannot therefore find that it would be good labour relations policy to, notwithstanding our finding and in the absence of any compelling labour relations reason, open the ballot box and count the ballots. That vote has been tainted by the employer involvement. In our view the proper remedy in this case is to dismiss the application and to order that the ballots cast in the March 11, 1997 vote be destroyed.

121. This application is hereby dismissed.

DECISION OF BOARD MEMBER J. A. RONSON; August 18, 1998

1. This is another case where, in its rush to castigate an Employer, the Board loses sight, entirely, of the intent and spirit of the *Labour Relations Act*. As in the *Wal-Mart* case (*Wal-Mart Canada Inc.; Re USWA* [1997] OLRB Rep. Jan/Feb. 141) the Board again refuses to listen to employees. Instead, in the same maternal fashion, we seek to tell the employees what they should want.

2. The evidence disclosed that Mr. Vandermeer, (one of the Applicants for the termination vote), was instrumental in bringing the Union into the store. The evidence also disclosed that a Union representative threatened to put the store out of business. As a result of this and other evidence and argument that I heard in this case, of one thing I am sure; - sooner or later the ballots from a de-certification vote at the IGA store in Bancroft will be counted.

3. Civic relations and labour relations at this "tiny little store in a tiny little town in Ontario", (to use the words of Mr. Kucey, the Union lawyer at the hearing), would be best served by counting that vote now. Nothing in the evidence dissuades me from accepting that at least 40% of the employees agree, and have expressed their democratic wishes pursuant to section 63 of the Act. By rejecting and

ignoring their wishes we look foolishly presumptive to the eyes of those who live in and without the small towns of Ontario.

4. I would order the ballot box unsealed and the ballots counted as soon as possible.
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2702-97-U Phyllis Fournier, Applicant v. United Steelworkers of America, Responding Party v. Burns International Security Services Limited, Intervenor

Duty of Fair Representation - Collective Agreement - Ratification and Strike Vote - Unfair Labour Practice - Employee alleging that union failed to provide adequate notice to employees of ratification vote - Application dismissed

BEFORE: *Christopher Albertyn*, Vice-Chair.

APPEARANCES: *Ian Werker* and *P. Fournier* for the applicant; *Robert Healey*, *Fil Falbo* and *Stuart Deans* for the responding party; *Richard J. Nixon* and *John Coletti* for the intervenor.

DECISION OF THE BOARD; August 5, 1998

1. This is an application under section 96 of the *Labour Relations Act, 1995* ('the Act') alleging a violation of sections 44(b), 74 and 79(7), (8) and (9) of the Act by the responding trade union ('the Union').
2. Burns International Security Services Limited ('the intervenor') was granted intervenor status in the application.
3. A decision with brief reasons was issued at the hearing of this matter on February 9, 1998, dismissing the application. What follows are the reasons for that decision.
4. The Union and the the intervenor entered into Minutes of Settlement on June 20, 1997. That settlement was the result of protracted litigation, discussions and negotiations between the Union and the intervenor, involving the complex resolution of several long-standing differences between the parties. The Minutes of Settlement resolved all outstanding issues between them, including matters over which they had been in dispute for some considerable period. The Minutes of Settlement incorporated four collective agreements (one for the Sudbury bargaining unit, one for the Ottawa bargaining unit, one for the Southwestern Ontario bargaining unit and one for the Provincial bargaining unit). The Minutes of Settlement were conditional upon the employees in each of the four bargaining units ratifying the Minutes of Settlement by July 30, 1997.
5. The applicant was employed by the intervenor in the Southwestern Ontario bargaining unit.
6. The only issue in the case was whether or not the Union provided adequate notice to employees in the Southwestern Ontario bargaining unit of the ratification vote which was to be held before July 30, 1997.
7. The intervenor's employees do not have a central, common place of work. They work on sites belonging to the intervenor's clients. For the ratification vote to be broadly representative, notice to employees must be given in a manner other than by the posting of a notice at the intervenor's premises.

8. The Union gave individual written notice to all of the employees for whom it had a record of an address. It also caused an advertisement to be published in all of the local newspapers of the cities and towns in which the votes were to be held. In respect of the Southwestern Ontario bargaining unit, the cities and towns were Windsor, Chatham, Sarnia, London, Tillsonburg, Woodstock, Brantford, St. Catharines, Hamilton, Cambridge, Kitchener and Burlington.

9. The applicant fell within the Tillsonburg area and she received individual notice of the ratification vote. The notice informed employees of the date, times and location of the vote in the various towns.

10. The advertisement of the ratification vote appeared in the 'Tillsonburg Independent' on July 11, 1997. The applicant did not see it.

11. The applicant cast a ballot in the ratification vote held at Tillsonburg on July 16, 1997.

12. The applicant's complaint was not that she did not receive notice of the vote; her complaint was that she was told by four fellow employees that they did not receive individual notice of the vote and they did not see the advertisement of the vote and so did not participate in it. The applicant provided no details of those who did not receive notice, nor of those who failed to participate in the vote by reason of their non-receipt of the notice. The applicant's belief is that notice in a newspaper was simply inadequate. The applicant sought that a new ratification vote be ordered.

13. The intervenor pointed out the considerable prejudice which would be caused by the ratification vote being set aside. The ratification vote was in favour of accepting the Minutes of Settlement concluded between the Union and the intervenor. The effect of the ratification was that the Union was certified for all of the four bargaining units of the intervenor in Ontario. If the ratification vote in the Southwestern Ontario bargaining unit were set aside, then there would not have been compliance by the Union with the terms of the Minutes of Settlement and all of the consequences flowing from those Minutes would potentially be jeopardized. There was the possibility of the Board case between the Union and the intervenor being revived. More than 50 hearing days had occurred when the Minutes of Settlement were concluded and, in the words of the intervenor's counsel, the Union and the intervenor had only "begun to scratch the surface" of the issues between them in that time. Were the ratification vote set aside, and if the dispute between the parties were revived, considerably more days of the Board's time would be required. Also, following the ratification vote, the Union and the intervenor had acted in terms of the collective agreements which were concluded as part of the Minutes of Settlement and the many acts done under those agreements might have to be reversed, were the ratification vote found to have been inadequate. Hence, it was made clear that the setting aside of the ratification vote had some very serious consequences for the Union and the intervenor.

14. The Union pointed out the delay in the applicant filing the application. The ratification vote in Tillsonburg was held on July 16, 1997. The ratification vote as a whole was completed by July 30, 1997. The Union and the intervenor acted forthwith upon the ratification and implemented the Minutes of Settlement and the collective agreements which were part thereof. The application was brought on October 21, 1997, over 3 months after the vote which offended the applicant. The Union argued that the application should be dismissed on account of the applicant's delay in bringing the application, alternatively that the delay should be weighed in the measurement of the relative prejudice to the parties of setting aside or not interfering with the ratification vote. As stated (at paragraph 31) in *Marriott Management Services* [1994] OLRB Rep. July 857, at 863, "it is not necessarily the length of a delay that holds significant labour relations consequences, but the intervening events which occurred during the period of delay." The applicant explained the delay in bringing the application as being the consequence of her learning of the outcome of the ratification vote only some significant time later.

15. Counsel for the intervenor pointed out that of a bargaining unit of approximately 1300 employees (in the Southwestern Ontario bargaining unit), the applicant was the only complainant in respect of the ratification vote and she herself had voted. Counsel contended that the applicant did not have a direct or practical interest in the matter and that her altruistic pursuit of the application on behalf of unnamed or unknown others was not sufficient to sustain a legal interest in the application.

16. The applicant's counsel argued that the applicant, a former shop steward, had an interest to ensure that the ratification vote was conducted democratically, and if information came to her attention which suggested that that was not so, she could legitimately request the Board to require a new ratification vote.

17. A ratification vote is primarily an internal matter between a union and its members. That is part of a union's and its members rights to freedom of association. However, given that there is a statutory obligation upon a union to conduct a ratification vote, the Board will scrutinize the adequacy of such a vote. The Union is obliged to make reasonable efforts to inform employees who are entitled to vote in a ratification vote of the date, time and venue of the vote. That obligation was fulfilled in this instance. The applicant and many other employees of the intervenor received individual notice of the ratification vote. The Union gave public notice to the employees of the intervenor by timely newspaper advertisements. In circumstances where there is no common workplace for employees, there is always a risk that some employees will not get notice of a ratification vote. The Board will assess whether the steps taken by the union concerned were reasonable in the circumstances. In my view the Union took reasonable steps in this case to bring the ratification vote to the attention of employees of the intervenor in a timely manner. None, barring the applicant, appeared to be discontent with the ratification vote, or else they would have joined her in the application. Her own interest in the matter was purely altruistic for she had no concerns in respect of notice to her personally of the vote. That somewhat remote interest, in respect of persons who remain unnamed and unspecified, and the lack of substantive evidence to back her concerns, were not sufficient, in my view, to cast doubt on the validity of the ratification vote.

18. In these circumstances I was not satisfied that there was sufficient substance to the applicant's complaint to warrant the Board's interference with the ratification vote. That view was enhanced by the substantial prejudice to a considerable number of people which might have resulted were the ratification vote to have been set aside. I found that the notice to employees of the ratification vote was in compliance with the provisions of the Act and I therefore concluded and ordered that the Board inquire no further into the application and that it be dismissed.

4725-97-M Clover Catering c.o.b. at Barton Place Nursing Home, Applicant v. Hotel Employees' and Restaurant Employees' Union, Local 75 of H.E.R.E. Int'l Union, Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Board finding that employees of catering company, working as cooks, dietary aides and porters at nursing home are "hospital employees" within meaning of *Hospital Labour Disputes Arbitration Act*

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

APPEARANCES: *Malcolm Winter* and *Philomena Oliver* for the applicant; *Mary Hart*, *James Jackson*, *Timoteo Duenas* for the responding party.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK; July 3, 1998

1. This is a reference to the Board pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (the "Act"). The issue is whether the employees of a third party company, working as cooks, dietary aides, and porters at a nursing home, are "hospital employees" within the meaning of the Act.

2. Section 1(1) of the Act defines "hospital" and "hospital employee" as follows:

"hospital" means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;

"hospital employee" means a person employed in the operation of a hospital.

FACTS

3. The case was argued on the basis of agreed facts. The facts were taken from the parties' pleadings and were supplemented by an additional statement prepared on the day of hearing. The agreed facts in the employer's pleadings provide:

1. Clover Catering is a private company which provides various food services to its clients. These services range from the delivery of complete "dietary services", including the supply of management and staff, as well as food, to function specific catering.
2. The Employer provides complete "dietary services" at Barton Place.
3. Barton Place is a Nursing Home, licensed under the Nursing Homes Act.
4. As such, Barton Place is considered to be a "hospital" within the meaning of that term under the Hospital Labour Disputes Arbitration Act R.S.O. 1990, c. H. 14.
5. Clover Catering employs persons in a variety of settings, including private sector establishments. It does not operate exclusively, or principally for one or more than one hospital.
6. The persons hired to provide the dietary services at Barton Place are hired by Clover Catering, and are employees of Clover Catering. They work under the direction of the staff of Clover Catering, and receive their pay cheques from Clover Catering.
7. Clover Catering has two collective agreements with the Union at Barton Place: one covering the full time employees and one covering the part time employees of the Employer.
8. The Employer carries on contract negotiations with the Union independent of any negotiations carried on between Barton Place Nursing Home and its employees.

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21. Alternative sources for resident diets and food are readily available in the quantities, and of the quality, required. As an indicator that this is the case, we ask the Board to consider that a number of the larger food services providers are beginning to discuss with clients, including those in the hospital sector, total off site preparation of meals, resulting in virtually no on site staff.

4. The agreed facts in the union's pleadings provide:

4. There are presently twenty-seven full-time and part-time employees covered by the collective agreements between Clover Catering and the Hotel Employees' and Restaurant Employees' Union working in food preparation and service at the Barton Place Nursing Home. All of the employees are employed on-site at the Barton Place Nursing Home.
5. The employees work as dietary aides, cooks and porters under the direction of a supervisor who also works on site at the nursing home. The dietary aides assist with the preparation of food and also assist in serving food in the dining room. Dietary aides deliver the prepared meals to both the dining room and, where a resident is not able to eat in the dining room, to the resident's rooms. These individuals also provide some assistance in the serving of residents who require support. The cooks, of whom there are three, have primary responsibility for food preparation. Food is prepared to meet the specialized needs and preferences of the residents of the home. Meals are prepared, for example, in accordance with medical direction, such as in the case of residents requiring a specialized diabetic diet. Meals are also prepared to meet the cultural preferences of the residents. Porters are responsible for the cleaning of the kitchen and the other related duties. The food service employees work at the facility on both the day and evening shifts and are responsible for the preparation and provision of all meals in the facility. The food service employees also prepare snacks for the residents in accordance with their medical restrictions.

5. The additional facts prepared on the day of hearing appear precisely as follows:

1. Current Food Services Supervisor & Assistant Food Supervisor are trained and have experience in food preparation and delivery.
2. This experience of these two individuals is, however, not recent and these persons have not been involved in either the preparation or delivery of food except on a very sporadic basis in the last two years or so. They are responsible for supervision of the dietary aides but may not be in the dining room for every meal or for the entire meal.
3. Dietary staff with the exception of two cooks have received no special training. All staff provided with orientation when they start. Orientation provided by Food Services Supervisor. The majority of employees in this bargaining unit have many years of experience at Barton Place Nursing Home. A significant number have been employed with facility for eight or more years.
4. In the event of a strike or lockout the persons who might be used as replacement workers would have no experience with the facility or residents.
5. Cleaning services are provided through a contractor, the employees of whom are unionized by the service employees union.
6. For further clarity to union's points on the seventh floor a dietary aide portions the food on the plates which are then delivered by the nursing staff. On 6th floor the food is plated in the kitchen and delivered to floor by porters. Trays are delivered by other nursing home staff.
7. Approximately 254 residents, there are two dining rooms, one on the 7th floor and one in the basement. Kitchen located in the basement adjacent to the dining room. The majority of the residents, approximately 200 for each meal, are served in the basement dining room. There are two sittings of approximately 95 to 100 residents. There are three main meals and two snacks served daily. For breakfast the first sitting is at 7:30 and the second sitting between 8:00 and 8:15. Lunch the first sitting is at 11:30 and the second at 12:30. Dinner - the first sitting is at 4:30 and the second sitting at 5:30. Residents spend approximately 1/2 hour in the dining room for each meal. In between sitting dietary aides clear tables, clean tables and reset the dining room. There is one sitting per meal on the 7th floor serving approximately 35 to 40 residents.

8. Current staffing for dietary aides is 4 over breakfast and lunch in the main dining room and one upstairs. Three dietary aides in the main dining room for dinner plus one upstairs. One porter at each meal time.

9. Dietary aides in the main dining room obtain food from the kitchen staff to deliver to the residents. The dietary aides takes orders from the residents of regular or alternative meals and responsible for deliver of special meals as required or ordered to particular residents. Special meal include mince or puree, diabetic meals. Need for special meals on a card on the table. Each resident has a card at their place setting. Dietary aides also serve special ethnic food to particular residents. Dietary aides are responsible for ensuring the right meal reaches the right resident. Food does not have to be delivered by someone in the dietary aide classification.

10. All types of meals required in the nursing home including specialty meals are available through a number of providers in the city on a just in time basis. All nursing homes are required to have alternate providers of food in the case of an emergency. Clover Catering has been contracted to provide food in an emergency but has never been required to.

SUBMISSIONS

6. On the basis of these facts, the employer argued that the employees are not “hospital employees” within the meaning of the Act. The employer urged us to apply a “labour relations”, as opposed to an “institutional”, test to the definition, balancing the fundamental right of employees to strike against the need of the public to uninterrupted hospital services. The employer relied on the following passage from *Extendicare Diagnostic Services*, [1982] OLRB Rep. March 371 at 375:

12. ... The legislature has determined that the need of the public to uninterrupted hospital services takes precedence over the right of certain individuals to resort to economic sanctions in support of collective bargaining objectives. It is against this backdrop that effect must be given to the definition of who is a hospital employee. This is not to say, however, given the statutory encroachment upon individual freedoms, that the Board should not be circumspect in applying the definition.

7. The employer also referred to *The Canadian Red Cross Society (Ontario Division)*, [1995] OLRB Rep. May 612 at 625, and the following factors drawn from the case law as relevant to the definition of “hospital” and “hospital employee”:

- (i) the nature or kind of care provided by the institution in question;
- (ii) the degree or extent of the care;
- (iii) the extent to which the recipients depend upon the care for their continued health or safety;
- (iv) whether the institution is under a statutory obligation to provide the care;
- (v) whether the individuals providing the care are employees of the institution or a third party;
- (vi) the location at which the care is provided;
- (vii) the existence of alternatives to the provision of the care by the employees in question;
- (viii) the historical practice of collective bargaining in the industry.

8. In this case, the employer submitted, most of the services provided by the employees are not technical or sophisticated; rather, they are quite basic. As such, they are easily replaced in the event of a strike or lockout. The dietary aides and porters have no special relationship with the residents and possess no knowledge that cannot be conveyed by the food services supervisor or assistant supervisor to replacement workers in the event of a strike. So also, the work of the cooks can be easily replaced by commercial suppliers of food products. There is no reason, with today's technology, why the cooking and "portioning" of food must be done on-site and, the employer submits, the Board's approach to the statutory definitions should reflect such developments.

9. Equally, if not more, importantly the employees in question are not employed by the nursing home but by a third party. Clover Catering's business is not tied to Barton Place but includes many other establishments as well. Among other things, this means that there is no real practice in the industry upon which to draw. Most food services are delivered by the employees of the institution at which they are provided in a bargaining unit which includes other categories of employees. Consequently, there is no real opportunity for the kind of separate assessment that we are invited to make in this case.

10. Although agreeing that the institution is under a statutory obligation to provide the dietary services, the employer notes that the regulations to the *Nursing Homes Act* only require one food services supervisor and one food services handler to be "on staff". This, it is said, must be contrasted with the requirement to have food services staff "on duty". Thus, to deliver these services in another way, in the event of a strike, would not place the home in breach of its statutory obligations. There is no statutory requirement for on-site preparation or portioning of food.

11. The employer also submits that the total number of hours of work of the kind formerly performed by bargaining unit members that would need to be performed on-site in the event of a strike would be minimal. It would consist only of the delivery of meals at meal times. All other work could be accomplished through other commercial arrangements. Thus, the extent of the care that may be required to be provided here may be less than that which was considered in *Red Cross*, above.

12. While conceding that the facts of this case fall "somewhat closer to the line" than the diagnostic services considered in *Extendicare*, the employer submits that we ought to reach the same conclusion. The employees providing dietary services in this case should not be considered "hospital employees" within the meaning of HLDAA.

13. The union, too, relies on the *Extendicare* decision but takes the position that the facts in this case fall "way over the line".

14. The union submits that the appropriate starting point for the analysis is not *Extendicare* but the decision of the Divisional Court in *Dignacare Incorporated c.o.b. as Orleans Community Health Centre* (Court File No. 462/90, released February 12, 1991, unreported). The union notes that, in *Dignacare*, the court took a liberal view of the statutory provisions having regard to the purposes of the Act. The purpose of the Act is to ensure that persons who are not adequately able to protect themselves, those who are among the most vulnerable in our society, are not placed at risk in the event of a work stoppage.

15. Turning to *Extendicare*, the union invites us to consider the passages which follow those relied on by the employer:

13. We start by observing that the definition carefully avoids restricting the application of the statute to only those employed by a hospital. The definition extends to all persons "employed in the operation of a hospital". Given the purpose of the statute and the multiplicity of business arrangements under which an organization such as a hospital can meet its objectives, it is not surprising that the definition focuses, not on the identity of the employer, but on the function performed by

those whose services are so important to society as to abridge their right to free collective bargaining.

14. The term “hospital” as defined in the *Hospital Labour Disputes Arbitration Act* includes hospitals, sanitariums, sanatoriums, nursing homes and certain other types of institutions. Because it is a person’s function which is determinative of whether that person is a “hospital employee” and because a number of different types of institutions are covered by the definition of “hospital” contained in the *Hospital Labour Disputes Arbitration Act*, we accept that when determining if a person is a “hospital employee” reference should be had to the type of institution within which or to which that person provides a service or performs a function and to the statute which specifies the services which that institution is required to provide. At the least, it is the uninterrupted delivery of these services which the *Hospital Labour Disputes Arbitration Act* is designed to ensure.

16. The central questions which *Extendicare* invites us to address, according to the union, are: what are the functions in question; to what type of institution are they provided; and is there a statutory obligation to provide the services. In this case, the functions are “core” functions that are statutorily required to be provided to residents of the home. This stands in sharp contrast to the “routine laboratory investigations” considered in *Extendicare*. Such functions were incidental to the work of the home and the home was under no statutory obligation to provide facilities for the carrying out of such tests. In the present case, the home must provide on-site meal delivery.

17. The union also takes issue with the assertion that the services provided by the members of the bargaining units can be withdrawn and replaced with no disruption and no risk to the health, safety or well-being of the residents. Strikes are often called at the last minute and may be accompanied by picket lines. In this case, hundreds of residents must be fed at specific times of the day and there are requirements for special diets. A strike could interfere with the efficient and safe delivery of these services.

18. The union agrees with the factors identified in *Red Cross*, above, but notes that some are clearly more important than others. Critical among these are the degree of dependence on the services, the statutory obligation to provide them, and the location at which they are provided. Having regard to these factors, the union submits, there can be no doubt that the employees in question are “hospital employees”.

DECISION

19. The Board agrees with the union.

20. We are dealing here with the provision of food services. Apart from nursing care, it is difficult to imagine an activity that is more central to the health and well-being of the residents.

21. The residents depend on the services provided by members of this bargaining unit for their very existence. While the work may not be complex or sophisticated, it is essential to the resident’s security. While there may well be alternative sources of food supply, and persons willing to provide it in the event of a strike, such arrangements would not be without risk. The right meals must be served to the right residents at the right times. Errors and delays in the provision of meals (including “diabetic meals”) could seriously compromise the health of the residents. The Board is of the view that the residents should not be required to bear such risks. While it is obvious that, like all labour relations decisions, there is a balancing of interests to be undertaken, that balance is drawn by the statute and the Board is of the view that it clearly favours the residents in this case.

22. The fundamental nature of these services is demonstrated by the statutory requirement to provide them. Along with the union, we have some doubts as to whether the regulations admit of the degree of flexibility claimed by the employer. However, we need not decide that question. For us,

the important points are the nature of the functions in question (the feeding of the residents), the agreed statutory obligation to provide the services (which demonstrates their essential nature), the degree of resident-dependence on the services provided (substantial) and the potential harm associated with errors or delays in the delivery of those services (significant).

23. We note, as well, that the Act does not define “hospital employee” as a person employed “by a hospital” but “*in the operation of a hospital*”. We adopt the following passage from *Extendicare* as an accurate description of the rationale underlying that definition:

13. ... Given the purpose of the statute and the multiplicity of business arrangements under which an organization such as a hospital can meet its objectives, it is not surprising that the definition focuses, not on the identity of the employer, but on the function performed by those whose services are so important to society as to abridge their right to free collective bargaining.

24. Without suggesting that the contract in this case was entered into by the Home for the purpose of facilitating the employer’s argument (a finding that we cannot and were not invited to make), we note that the specific “arrangement” undertaken here must be the most basic among the “multiplicity” contemplated by *Extendicare*. As the Board observed in that case, the language of the statute was intended to insure that such arrangements would not inhibit the fulfillment of the statutory objectives. Indeed, given what is fairly described as the “core” nature of the functions, we have serious doubts as to whether this issue would even have come before us had the services been provided by the Home, as opposed to a third party, whether or not the employees were included in an “all employee” or a separate bargaining unit. In short, we cannot attach much significance to the identity of the service provider.

25. Reduced to its essence, this case involves the provision of essential services (the preparation and delivery of food) to nursing home residents at the nursing home, a named institution within the definition of a “hospital”. In these circumstances, the Board has no hesitation in advising the Minister that the employees in the two bargaining units who work at the Barton Place Nursing Home fall within the definition of “hospital employees” in the Act.

DECISION OF J. A. RUNDLE, BOARD MEMBER; July 3, 1998

I dissent.

3858-97-PS The Corporation of Loyalist Township, Applicant v. Canadian Union of Public Employees and its Local 2150, Ontario Public Service Employees Union and its Local 445 and Service Employees International Union, Local 663, Responding Parties

Bargaining Unit - Public Sector Labour Relations Transition Act - Representation Vote - Board earlier determining that separate full-time and part-time bargaining units appropriate for successor municipality’s operation and directing representation votes - Employer objecting to holding of vote in part-time unit on basis of its assertion that there were no part-time employees in the predecessor part-time bargaining unit (although there were 50 to 77 non-union part-time employees) - Board concluding that representation vote required by virtue of section 23(2) of Public Sector Labour Relations Transition Act

BEFORE: D. L. Gee, Vice-Chair.

DECISION OF THE BOARD; July 27, 1998

1. By decision dated June 1, 1998, pursuant to section 22 of the *Public Sector Labour Relations Transition Act, 1997*, (the "Act") the Board determined that two separate bargaining units, one full-time and one part-time, are appropriate for the operations of the Corporation of Loyalist Township.

2. A representation vote was held on July 2, 1998 in the following voting constituency:

all employees of the Corporation of the Loyalist Township save and except supervisors/operators, department heads, persons above the rank of supervisor/operator and department head, ferry services employees, training officer, volunteer fire fighters, confidential secretary and persons regularly employed for twenty-four (24) hours per week or less and students employed during the vacation period.

3. A majority of the votes was cast in favour of Canadian Union of Public Employees and its Local 2150. Accordingly, under section 23(9) of the Act, any bargaining rights possessed by Service Employees International Union, Local 663 in respect of employees in the full-time bargaining unit are hereby terminated.

4. The Board appoints Canadian Union of Public Employees and its Local 2150 as the bargaining agent in respect of the full-time unit being:

all employees of the Corporation of the Loyalist Township save and except supervisors/operators, department heads, persons above the rank of supervisor/operator and department head, ferry services employees, training officer, volunteer fire fighters, confidential secretary and persons regularly employed for twenty-four (24) hours per week or less and students employed during the vacation period.

5. The Registrar will destroy the ballots cast in the representation vote cast in respect of the full-time bargaining unit following the expiry of 30 days from the date of this decision unless a statement requesting that the ballots not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

6. A vote has not been conducted with respect to the part-time unit as the Corporation of Loyalist Township asserts that no vote should be ordered as there were no employees in the part-time bargaining unit on the change-over date and remain no such employees to date, however, there were, and remain, between 50 and 77 non-union part-time employees. The Service Employees International Union, Local 663 asserts that there was and is a part-time employee for whom it holds representation rights and, in any event, the Board is required by virtue of the language of section 23(2) to hold a representation vote. A hearing was held on July 21, 1998, to hear the submissions of the parties on this issue.

7. It is my determination that the position taken by the Service Employees International Union, Local 663 is correct. The Act mandates that the determination as to which of the bargaining agents, if any, represents employees in a bargaining unit determined by the Board to be appropriate be made by way of the conduct of a vote. The language of section 23(2) is directory. The Board does not have a discretion in this regard. Further, the only means provided for in the Act for the termination of a trade union's bargaining rights is by way of a Board order following the conduct of a vote. Absent the conduct of a vote, there is no mechanism provided for whereby the Board could terminate the bargaining rights of the Service Employees International Union, Local 663.

8. Accordingly, the matter is hereby referred to the Manager of Field Services for the appointment of a Board Officer to consult with the parties for the purpose of making vote arrangements for the conduct of a vote in the following voting constituency:

All part-time, casual and student employees regularly employed for not more than twenty-four (24) hours per week.

1006-98-M Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario (as represented by Management Board Secretariat), Responding Party

Crown Employees Collective Bargaining Act - Essential Services - Health and Safety - OPSEU and Management Board asking Board to determine several issues arising from essential service bargaining conducted pursuant to *Crown Employees Collective Bargaining Act* - Board concluding that it is not open to the Board to order the employer not to use replacement workers in the event of a work stoppage, nor to direct that that determination should guide the parties in their negotiation of an essential services agreement - Board directing parties to negotiate terms and conditions of essential and emergency service workers who may be required to work in the event of a work stoppage - Board directing parties to negotiate as part of essential service agreement a protocol to ensure that a designated bargaining unit essential service worker who is unable to attend at work can be replaced by another bargaining unit worker - Board directing parties to bargain as part of essential service agreement a protocol for those situations where a designated essential service worker exercises the right to refuse unsafe work under *Occupational Health and Safety Act*

BEFORE: *Gail Misra*, Vice-Chair.

APPEARANCES: *Donald K. Eady, Tim Hadwen, Andy Todd, Terry Stinson, David Chen and Alyssa Hamilton* for the applicant; *Leonard Marvy, Donna Holmes, Kevin Wilson, Gail Fisher, Greg Gledhill, Norman Manara, Janet Myers, Judy Stamp and Brian Gaston* for the responding party.

DECISION OF THE BOARD; August 7, 1998

1. This is an application made pursuant to section 36 of the *Crown Employees Collective Bargaining Act, 1993* ("CECBA"), seeking a determination from the Board regarding several issues arising out of essential service bargaining conducted pursuant to section 34 of this Act.

2. It would appear that the parties commenced bargaining with respect to concluding an essential services agreement in June 1998 and have participated in between five and six days of bargaining to negotiate an essential services agreement for the deemed bargaining unit. While they have made some progress, they remained divided on four issues. A consultation was held in this application on June 26, 1998, at which time the parties made submissions with respect to the following issues:

- a) The inter-relationship between sections 32, 40(1) and 41.1 of CECBA in connection with the use of other persons to do the applicant's essential work under an essential services agreement;
- b) What terms and conditions of employment apply to essential and emergency service workers under an essential services agreement;
- c) What happens if a person designated essential pursuant to an essential services agreement does not show up for work; and,

d) What happens if a person designated essential pursuant to an essential services agreement exercises his or her right under the *Occupational Health and Safety Act* to refuse to perform unsafe work.

3. Part IV of the CECBA addresses "Essential Services". The relevant sections state:

30. Definitions.- In this Part,

"essential services" means services that are necessary to enable the employer to prevent,

- (a) danger to life, health or safety,
- (b) the destruction or serious deterioration of machinery, equipment or premises,
- (c) serious environmental damage, or
- (d) disruption of the administration of the courts or of legislative drafting; ("services essentiels")

"essential services agreement" means an agreement between the employer and trade union that applies during a strike or lock-out and that has,

- (a) an essential services part that provides for the use, during a strike or lock-out, of employees in the bargaining unit to provide essential services, and
- (b) an emergency services part that provides for the use, during a strike or lock-out, of employees in the bargaining unit, in addition to those referred to in clause (a), in emergencies; ("entente sur les services essentiels")

32.(1) Essential Services part.- The essential services part of an essential services agreement must include provisions that,

- (a) identify the essential services;
- (b) set out how many employees in the bargaining unit from what employee positions are necessary to enable the employer to provide the essential services; and
- (c) identify the employees who the employer and trade union have agreed will be required during a strike or lock-out to work to the extent necessary to enable the employer to provide the essential services.

(2) **Same.-** For the purposes of clause 1(b), the number of employees in the bargaining unit that are necessary to provide the essential services shall be determined without regard to the availability of other persons to provide essential services.

34. Agenda of negotiation, essential services part.- In negotiating the essential services part of an essential services agreement, the employer and trade union shall negotiate with respect to the following issues in the following order:

- 1. What types of services are essential services.
- 2. What levels of the types of essential services are necessary to prevent,
 - i. danger to life, health or safety,

- ii. the destruction or serious deterioration of machinery, equipment or premises,
 - iii. serious environmental damage, or
 - iv. disruption of the administration of the courts of legislative drafting.
- 3. What employee positions are necessary to enable the employer to provide the types of essential services at the necessary levels.
- 4. How many employees in the bargaining unit, in employee positions referred to in paragraph 3, are necessary to enable the employer to provide the essential services at the necessary levels.
- 5. Which employees will be required during a strike or lock-out to work to the extent necessary to enable the employer to provide the essential services.

36.(1) Application to the Board.- On application by the employer or trade union, the Ontario Labour Relations Board shall determine any matters that the parties have not resolved and in doing so the Board may,

- (a) determine any matters to be included in an essential services agreement between the parties;
- (b) order that terms specified by the Board be deemed to be part of an essential services agreement between the parties;
- (c) order that the parties be deemed to have entered into an essential services agreement; and
- (d) give any other such directions as the Board considers appropriate.

(2) **Same.-** The Board may consult with the parties to resolve any matter raised by the applications or may inquire into any matter raised by the application, or may do both.

(3) **Orders after consultation.-** The Board may make an interim or final order it considers appropriate after consulting with the parties or on an inquiry.

(4) **Reconsideration.-** On a further application by the employer or trade union, the Board may modify any determination or direction in view of a change in circumstances.

38. (1) Enforcement of essential services agreement.- A party to an essential services agreement may apply to the Board to enforce it.

(2) **Amendment of agreement.-** A party to an agreement may apply to the Board to amend it,

- (a) if the agreement does not provide for services that are essential services;
- (b) if it provides for levels of service that are greater or less than required to provide the essential services; or
- (c) if it provides for too many or too few employees in the bargaining unit to provide the essential services.

(3) **Order.-** On an application under this section, the Board may enforce the agreement or amend it and may make such other orders as it considers appropriate in the circumstances.

(4) **Same.-** Subsection 32(2) applies with necessary modifications when the Board is deciding an application under subsection (2).

40. (1) Use of employees, essential services.- During a strike or lock-out, the employer is entitled to use, to provide essential services, such employees in the bargaining units as are necessary as provided in the essential services part of the essential services agreement.

(2) Notification of employees.- The employer shall notify the employees who, under the essential services part of the essential services agreement, the employer is entitled to use under subsection (1) during a strike or lock-out.

(3) Limitation on strike, lock-out rights.- Employees who have been notified by the employer or trade union that the employer is entitled to use them under subsection (1) may not strike and may not be locked out.

(4) [Repealed S.O. 1995, c.1, s.43.]

41. (1) Use of employees, emergency services.- In an emergency during a strike or lock-out, the employer is entitled to use such employees as the emergency services part of the essential services agreement provides for.

(2) Limitation on strike rights.- Employees who have been notified that the employer is entitled to use them under subsection (1) and wishes to do so may not strike while the employer is so entitled and so wishes.

(3) [Repealed S.O. 1995, c.1, s.44.]

41.1 (1) Use of other persons.- An essential services agreement shall not directly or indirectly prevent the employer from using a person to perform any work during a strike or lock-out.

(2) Same.- A provision in an essential services agreement that conflicts with subsection (1) is void.

* * *

a) The inter-relationship between sections 32, 40(1) and 41.1 of CECBA in connection with the use of other persons to do the applicant's essential work under an essential services agreement

4. The Ontario Public Service Employees Union ("OPSEU" or the "union") requests that the Board issue an order that the responding party (the "Crown" or the "government employer") cannot utilize replacement workers during a strike or lock-out. Its alternate position is that the Board order that replacement workers cannot do any work in a workplace where essential service workers are working in accordance with an essential service agreement. In the further alternative, OPSEU requests that the Board order that replacement workers cannot do essential services work. The union defines replacement workers to include OPSEU members who cross the picket line to return to work, replacement workers or contractors hired by the Crown, and other Crown employees who would not normally be doing OPSEU bargaining work. Replacement workers would not include management or other excluded workers.

5. While OPSEU recognizes that the public sector's right to strike must be balanced against the public interest and need for essential services, it argues that in order to ensure a rational outcome of a labour dispute, there must be meaningful collective bargaining. To achieve meaningful collective bargaining, both a trade union and an employer must fear that a strike or lock-out may take place. Thus whatever scheme is in place to facilitate collective bargaining, it must maximize pressure on each side to ensure that quick and fair settlements are reached. The union points out that pursuant to section 2(1) of the CECBA, the *Labour Relations Act, 1995* is deemed to form a part of this Act. One of the purposes of the *Labour Relations Act, 1995* is to "promote the expeditious resolution of workplace disputes" (section 2(7)) and to "encourage co-operative participation of employers and trade unions in resolving workplace issues" (section 2(6)). The CECBA contains no purpose clause.

6. According to the union, Bill 117, which gave public sector employees the right to strike in 1993, maintained a balance between the public interest in the provision of essential services, the public interest in the right of organized employees to strike or for the employer to lock out its employees, and in the labour relations goal of meaningful collective bargaining. It achieved this by creating a regime in which the government employer could use its non-bargaining unit staff and designated essential service workers to do bargaining unit work which had been identified as essential so that services which had been agreed as essential to the public good could continue to be provided. Bargaining unit employees required to work during a labour dispute would work under the terms and conditions of employment prevailing prior to the labour dispute commencing. Bill 117 also minimized the number of bargaining unit employees who would be deprived of the right to strike by limiting the numbers of employees who would be designated as "essential" and therefore unable to strike. Thus, the government employer would feel the pressure of a strike or lock-out because it would have to use its human resources to the fullest to continue to provide essential services, the union would feel the pressure of having part of its membership unable to strike and of the employer ability to continue to provide some services even during a labour dispute. The Labour Relations Board was available to the parties after 10 days of a strike or lock-out to consider whether meaningful collective bargaining was being prevented for some reason, and had the power to order a number of remedies, including sending the parties to interest arbitration to settle the collective agreement if the Board was of the view that meaningful collective bargaining was not possible.
7. The union points out that as a consequence of the enactment in late 1995 of Bill 7 by the present government, the CECBA provisions regarding essential services were amended. Section 32(2), which required that in arriving at the number of bargaining unit employees necessary to provide essential services, the parties had to take into account all other persons who the employer could legitimately utilize, was removed (also referred to as the management off-set provision). Sections 40(4) and 41(3), which dictated the working conditions of those deemed essential or emergency workers, were also removed. The Board's power to refer the parties to interest arbitration if meaningful collective bargaining was not taking place was rescinded. Pursuant to the provisions of Bill 7, as reproduced above, section 32(2) requires the parties to arrive at the number of bargaining unit employees necessary to enable the employer to provide essential services *without* regard to the availability of other persons to provide these services (see section 38(4)). Even if the parties apply to the Board for an amendment to an essential services agreement ("ESA"), the Board must also decide on the number of bargaining unit employees necessary to enable the employer to provide essential services *without* regard to the availability of other persons to provide these services. Section 41.1 was added: That provision directs that an ESA shall not prevent the employer from using a person to perform any work during a labour dispute.
8. The union takes the position that the amendments to CECBA changed the balance of power so fundamentally that the right to strike had been rendered meaningless, and the essential services regime is now unworkable. The union argues that the Board, pursuant to the powers granted to it in section 36(1)(d) and (3), has the jurisdiction to remedy the imbalance by ordering that the Crown cannot use replacement workers and others.
9. Relying on a line of British Columbia Labour Relations Board jurisprudence, the union argues that the B.C. Board made a ruling of the sort sought here, and that that Board's decision was upheld on both judicial review and when it was further reviewed by the B.C. Court of Appeal. (See *Beacon Hill Lodge v. B.C.N.U. and H.E.U.*, No. 2/86 B.C.L.R.B.; *Beacon Hill Lodge v. B.C.*, [1986] B.C.S.C., No. 2431 B.C.J.; *Beacon Hill Lodge v. B.C.N.U. and H.E.U.*, No. 238/86 B.C.L.R.B.; *Beacon Hill Lodge v. B.C.*, [1986] B.C.S.C., No. 1260 B.C.J.; *Beacon Hill Lodge v. B.C.*, [1987] B.C.C.A. No. 713 B.C.J. The B.C. *Labour Code* did not contain a provision banning replacement workers. The union argues here that the Ontario Labour Relations Board has supervisory powers designed to preserve the

balance between the union and employer parties to an ESA (see section 36(a) to (c), and sections 38 and 42).

10. Counsel for the Crown argues that Part IV of the CECBA, dealing with essential services, only requires the employer to bargain with the union about bargaining unit positions, and since the *Labour Relations Act, 1995* does not restrict an employer from hiring replacement workers, it is open to the employer to do so. Furthermore, the Crown relies on the passage of section 41.1 for the proposition that the employer can specifically use anyone it wants to perform work during a labour dispute.

11. The Crown argues that the Board does not have the jurisdiction the union is arguing it does, and that the Board would be re-writing the legislation if it finds it does have it. According to the Crown the only power the Board has is to deal with matters related to an ESA, and to give the parties some direction to assist them in reaching an agreement or make orders in matters related to the ESA. Any order the Board makes would become part of the ESA, so that the Board's jurisdiction about the employer's use of other persons to perform work during a labour dispute is clearly restricted by the CECBA provisions. The Crown argues that the Board must recognize that the overriding objective is the continuation of services to the public and that the balancing of the interests of collective bargaining and the relative powers of the parties are secondary to this objective.

12. It is the employer's position that section 41.1 and other sections of Part IV are all designed to ensure that while the union and the Crown must bargain an ESA for bargaining unit members, there is nothing to preclude the Crown from using whatever other human resources it wishes to utilize during a labour dispute. It argues that section 41.1 has to have meaning, and that this section is consistent with the employer's view that there is a need to provide essential services, and to provide the employer with flexibility so that it can run its essential services at will using anyone it wishes to.

13. The employer suggests that the union is not without recourse if the employer uses replacement workers in great numbers: it can apply to the Board for a variation of the ESA with respect to the numbers of employees which the parties had originally agreed upon.

14. With respect to the union's reliance on the B.C. Labour Relations Board and related jurisprudence, the Crown states that the legislation in that province is quite different from the legislative mandate this Board has. The intent of the CECBA is that the parties are responsible for reaching an ESA, and the Board oversees that process. In B.C., that Board is responsible for determining essential services from the beginning of the process and has a much broader jurisdiction.

15. The second aspect of the union's position on this first area of dispute is that where the parties have agreed on the number of bargaining unit employees needed to provide essential services, and where they have agreed that the employer can use some of its own substitutes for those employees in an agreed-upon ratio, the employer cannot use any *more* persons to do the same functions. The union relies on the wording in sections 32 and 34 of the CECBA that the parties are to identify the employees who will be required during a labour dispute "to work to the extent necessary to enable the employer to provide the essential services" or to "enable the employer to provide the types of essential services at the necessary levels". The union argues that "necessary" and "to the extent necessary" connote a minimal number.

16. Section 41.1 of the CECBA specifies that an essential services agreement shall not directly or indirectly prevent the employer from using a person to perform "any work during a strike or lock-out", and that any provision in an ESA which conflicts with this provision is void. The union argues however that there is nothing in this section to prevent the *Board* from making an order that the Crown

cannot use replacement workers. The Board's power, according to the union, is grounded in sections 36(1)(d) and 36(3).

17. I have carefully reviewed the parties' submissions and the provisions of CECBA. In my view, the Board has no power under the current Act to grant the union's request. As I analyze the legislative history, the Bill 117 version of CECBA struck a particular balance between the employees' right to engage in meaningful collective bargaining, on the one hand, and the protection of the public through the delivery of essential services, on the other. The current version of the statute rejects that balance between those interests as evidenced by the government's own submission wherein it argues that the continuation of services to the public is the overriding statutory objective. The value of the ESA in maintaining that earlier balance no longer obtains. The parties must still reach an essential services agreement and must identify the number of bargaining unit employees needed so as to enable the government employer to "provide the types of essential services at the *necessary levels*" (emphasis added, see section 34(3)). Yet on the other hand the parties must now negotiate about the number of employees necessary to provide essential services *without regard to the availability of other persons* to provide those same services (see section 32(2)). Section 41.1 further clarifies the point that the government employer is to be free to use anyone to do any work during a labour dispute. Therefore, the reference to "necessary levels" becomes somewhat meaningless. The labour relations consequence of the application of the CECBA provisions is that the government employer is able to require its unions to negotiate essential services agreements pursuant to which the government employer is assured that a certain number of its regular bargaining unit employees are deprived of the right to strike, and must attend at work during a labour dispute, AND, it can use replacement workers during that labour dispute.

18. In *Beacon Hill Lodge v. B.C.N.U. and H.E.U.*, No. 2/86 B.C.L.R.B. Jan. 3, 1986, the British Columbia Labour Relations Board expressed the sentiment that it is the role of that labour relations tribunal to maximize the amount of economic pressure on both sides to a labour dispute so as to encourage the parties to conclude a collective agreement and an end to a labour dispute. That Board's jurisdiction in the designation of essential services is derived from section 73 of the B.C. *Labour Code*, which states:

73.(1) Where a dispute between an employer and a trade union is not resolved, and as a consequence an immediate and serious danger to life or health is likely to or is continuing to occur, the minister may do either or both of the following:

(a) recommend that the Lieutenant Governor in Council, by order, prescribe a cooling off period not exceeding 40 days during which no employee or trade union shall strike and no employer shall lock out his employees or during which an existing strike or lock-out shall be suspended; or

(b) request the board to designate the facilities, productions and services it considers necessary or essential to prevent immediate and serious danger to life, health or safety, and the board may order the employer and the trade union to continue to supply, provide or maintain in full measure those facilities, productions and services and not to restrict or limit a facility, production or service so designated.

(2) The Lieutenant Governor in Council shall not make an order under this section more than once in respect of the same dispute.

Further, and pursuant to its general remedial powers, in that province the B.C. Board has the jurisdiction to control a public sector strike or lock-out so as to ensure that a balance of power between the parties is maintained while at the same time essential services are provided to the public.

19. In *Beacon Hill Lodge*, cited above, a hospital providing long term care was involved in a labour dispute and the Minister had referred the matter to the B.C. Board under section 73 of the Code.

The Board had designated the hospital an essential service. Beacon Hill Lodge then took the position that it should be entitled to relieve itself of the administrative pressure caused by the Board's designation by hiring paid replacement nurses instead of or in addition to those nurses required to work pursuant to the Board's decision. The B.C. Board, in refusing to grant the employer's request, stated as follows:

A strike under Section 73 which results in a request by the Minister to the Labour Relations Board that it designate essential services and provide for the maintenance of those services to the public in order to prevent immediate and serious danger to life, health or safety, does not result in a designation and nothing more by the Board. The Board's designation of essential services and subsequently the Board's orders as to how those services are to be provided is not a static order setting a minimum level of service to which either the union or the employer can react in labour relations terms to minimize the economic pressure caused by the Board's order. To put it another way, the Board's essential services designation does not provide a platform from which the employer can spring with self-help measures designed to eliminate the effect of the union's strike or of the union's resistance to a lock-out. The error to which Beacon Hill Lodge falls prey in this case is to forget that this is not a private sector non-essential industry labour dispute.

Were counsel for Beacon Hill Lodge to succeed in his interpretation of Section 73 of the Code, the exercise of the Board's discretion in designating essential services would be exercised with an air of unreality, to the extent that the Board would be required to pretend that the economic contest between the employer and the trade union simply did not exist. In our view, the Board's obligation to protect the public does not require the Board to operate with such a complete detachment from reality. Were counsel for Beacon Hill Lodge to succeed in this case, the Board would be limited to determining the number of members of the BCNU required to perform those services necessary to maintain the level of service essential to prevent immediate and serious danger to life, health or safety, in the event that the BCNU exercises its legal right to strike at Beacon Hill Lodge. The employer then would be entitled to hire additional replacement nurses and, more importantly, to require the Board's assistance in directing other union members to work alongside these hired strike replacements.

Rather than exercising its discretion in a neutral way with a view to maximizing the economic pressure on both sides to advance the public interest by shortening a labour dispute affecting an essential service, while at the same time ensuring that the labour dispute does not interfere with the provision of that level of services necessary or essential to prevent immediate or serious danger to life, health or safety, the employer would have the Board act in a manner which directly and powerfully advances the employer's interests. A Board order directing members of the HEU to work alongside hired paid replacements would have the certain result of removing any impact of the lawful strike on the employer. This result does not operate in the long term interest of the public, simply because without any economic pressure on the employer's side of the equation of the labour dispute, the dispute is likely to endure for a much longer time and to result in a much longer disruption to the public's access to that essential service. That is not the result contemplated by Section 73.

• • •

We decline to give the interpretation to Section 73 and to place the limits on the Board's power, pressed by counsel for the employer, which would have the result of placing Beacon Hill Lodge in a stronger position than a non-essential service employer to the extent that its ability to resist the strike would be advanced by the "assistance" of the Board in ordering HEU members to work alongside hired strike replacements, a result which would not occur in the private non-essential sector.

20. As noted earlier, the B.C. Board's decision was judicially reviewed (see *Beacon Hill Lodge v. B.C.*, [1986] B.C.S.C., No. 1260 B.C.J.). The British Columbia Supreme Court in its decision upholding the Board's decision stated:

39. An order of an inferior tribunal can sometimes be attacked as patently unreasonable. The Board's view that it is appropriate that union employees should not be required to work with non-union employees cannot be said to be patently unreasonable. It is the very sort of decision that is peculiarly within the skill and knowledge of the Labour Relations Board.

21. The Supreme Court decision was appealed to the B.C. Court of Appeal. That court unanimously dismissed Beacon Hill Lodge's application, upheld the lower court decision, and found the Board's decision reasonable (see *Beacon Hill Lodge v. B.C.*, [1987] B.C.C.A., No. 713 B.C.J.).

22. While the analysis and conclusion of the B.C. Board in *Beacon Hill Lodge* makes labour relations sense and addresses the fundamental and underlying issues inherent in the balancing of interests in public sector labour disputes, the Ontario Labour Relations Board is not subject to the same statutory framework. The CECBA only mandates the Board to address certain matters arising out of that statute, and makes no reference to the Board's general remedial powers under the *Labour Relations Act, 1995*. The thrust of Part IV of the CECBA, dealing with essential services, envisions the Crown employer and the trade union identifying the services which will be essential and then working out the number and identity of the bargaining unit employees needed to provide those essential services. It is only if and when one of the parties to the negotiations applies to the Board for assistance in resolving an issue that the Board is engaged in the essential services agreement process.

23. Section 36 must be read as a whole, and in doing so it would appear that the Board's powers are in relation to assisting the parties in reaching an essential services agreement. Section 38 allows the Board, again upon application by one party, to enforce or amend an ESA. Section 42 permits the parties to come back to the Board ten days after a work stoppage has commenced for a determination of whether meaningful collective bargaining has been prevented. These sections outline the Board's role in relation to essential services agreements.

24. Based on the scheme of the legislation before me I am of the view that a Board order or direction made as a result of an application under section 36 is an order or direction regarding the negotiation of the ESA. OPSEU concedes that section 41.1 of the CECBA specifies that an essential services agreement shall not directly *or indirectly* prevent the employer from using a person to perform "any work during a strike or lock-out". Therefore, in my view it is not open to the Board to order at this stage of the negotiations that the government employer cannot use replacement workers in the event of a work stoppage, or direct that that is a determination which the parties must be guided by in their negotiations for an ESA. OPSEU's two pronged request is therefore denied.

* * *

b) What terms and conditions of employment apply to essential and emergency service workers under an essential services agreement

25. The union position is that prior to the commencement of a labour dispute the terms and conditions of employment applicable to the essential and emergency service workers must be the subject of bargaining, and that the employer cannot unilaterally decide on those terms and conditions of employment. If that is not the case, the union suggests that the essential service workers will be in the position of being conscripted workers, in the sense that they must work, cannot strike, and could be paid whatever the Crown wants to pay them. The union requests that the Board order the employer to bargain with the union about the terms and conditions of employment of essential and emergency service workers. The remedy requested includes that the parties have an enforceable obligation to bargain in good faith; that if they cannot reach an agreement, that they can return to the Board which will impose a resolution; and, that the Board should provide guidance to the parties about these negotiations.

26. OPSEU relies on the wording of section 32 and points out that that provision only outlines what *must* be included in an ESA - it is open to the parties and the Board to decide what else may be negotiated into an ESA, subject to the other provisions of CECBA Part IV. Further, section 36(1)(d) gives the Board the power to determine "any matters that the parties have not resolved", and to give

any directions which the Board considers appropriate. Section 36(3) is a broader provision designed to give the Board the power to make an interim or final order which it considers appropriate after consulting with the parties.

27. It would appear that prior to the consultation the employer had taken the position that it had no statutory obligation to negotiate about this matter. However, at the consultation the Crown indicated it was prepared to negotiate the terms and conditions of employment for essential service workers, to bargain in good faith, and to undertake to participate in the negotiations by 90 days before the end of the collective agreement, December 31, 1998. It asked the Board to make a direction to this effect, and indicated it would be prepared to have the Board direct that the parties can return to the Board on this issue if they cannot reach agreement.

28. The Crown view is that it has a unilateral right to set the terms and conditions of employment, and it argues that the Board has no jurisdiction to do more than what the employer is already prepared to do. Notwithstanding this view, the employer undertakes to apply whatever agreement the parties reach regarding terms and conditions of employment in the event that there is a labour dispute and essential service workers are required to work.

29. The parties must reach an essential services agreement before a strike or lock-out can commence (see section 13). The CECBA mandates what an ESA must include, when the parties must begin negotiations, and the order in which matters are to be negotiated. However, nothing in Part IV suggests that the parties cannot negotiate about other matters which may be peripheral to the legislated agenda, but without which the agreements would not be operational. Section 36 does not limit the Board's powers in what matters it can assist the parties in resolving so that they can reach an ESA. It is sensible to have a broad provision of the sort that section 36 is as it provides parties with access to a neutral body to help them break a log jam. Such a mechanism is particularly important when the legislation clearly states that without an ESA, there can be no strike or lock out. If section 36 was not available, parties may never get past essential service agreement negotiations, and therefore not get to the real issue between them, the negotiations for a new collective agreement.

30. The Bill 117 version of CECBA included provisions pursuant to which essential and emergency service workers had their terms and conditions of employment frozen at the pre-work stoppage level. The employer's rights, privileges and duties were similarly frozen. The employer and trade union could agree to some other regime, but the default position was a freeze. (See sections 40(4) and 41(3) of Bill 117).

31. As a result of the Bill 7 amendments in 1995, these two provisions were removed. However, there is nothing in the CECBA to preclude the negotiation of terms and conditions of employment for the workers in question. Indeed, it is counter-intuitive that parties would be discussing what services were essential, the numbers of workers necessary, who those workers would be, and that the employer would be informing the individual workers that they had to work, but that there would be no discussion about what those workers were to be paid and under what conditions they would have to work.

32. In an employment context the main matters of concern to workers are what work they will be expected to do, and what their terms and conditions of employment will be. In a unionized environment, where there is a bargaining agent for a group of employees, it is the bargaining agent which should be negotiating what the workers' terms and conditions will be. In the particular context of these parties readying themselves for a strike or lock out, if these issues are not resolved, it would not be surprising if on the eve of a work stoppage the parties are faced with an extremely disgruntled workforce. Especially when that workforce is expected, and indeed legally obliged, to provide essential services to the Ontario public. This would not be a desirable labour relations result nor desirable from a public policy perspective.

33. For the reasons outlined above, the Board is of the view that good faith bargaining about the terms and conditions of employment for those essential and emergency service workers who may be required to work in the event of a work stoppage is a necessary part of the negotiations between OPSEU and the Crown. Therefore, pursuant to section 36(3) the Board orders that the parties negotiate the terms and conditions of employment for essential and emergency service workers. The parties are directed to bargain in good faith and make every reasonable effort to reach agreement on this matter. The Board does not believe that the parties would have sufficient time to address this matter if it is left to the end of negotiations, and would therefore encourage the parties to engage in these negotiations as part of the essential services agreement bargaining. The parties may return to the Board on this issue if they cannot reach agreement. The Board declines at this early stage in the negotiations to give any further guidance regarding this matter.

* * *

c) What happens if a person designated essential pursuant to an essential services agreement does not show up for work

34. OPSEU's position on this issue is that if an essential service worker, who is a member of the union, does not report for work, then the union will have to supply another worker to cover for that position. In the event that the essential service worker is a manager or other person, then the union would not be responsible for supplying an additional essential service worker to cover for the absence.

35. The Crown argues that if an essential service worker is unavailable to work, the employer has the right to use other persons to perform the work until the worker returns. It is of the view that section 41.1 permits the employer to use managers, returning OPSEU members who have crossed the picket line, or replacement workers in these circumstances.

36. The "Essential Services" section of CECBA defines these services in Section 30 as services which "are necessary to enable the employer to prevent" danger to life, health or safety; destruction or serious deterioration of machinery, equipment, or premises; serious environmental damage; or, disruption of the administration of the courts or of legislative drafting.

37. Section 32 indicates what an essential services agreement *must* include: It must identify the essential services; it must set out how many employees in the bargaining unit from what employee positions *are necessary to enable the employer to provide the essential services*; and it must identify the employees who the employer and trade union have agreed will be required during a strike or lock-out *to work to the extent necessary to enable the employer to provide the essential services*. Subsection (2) of section 32 mandates that the number of bargaining unit employees necessary *shall* be determined *without regard to the availability of other persons* to provide essential services.

38. It is obvious from the provisions outlined above that the legislators, who are also the employers, have expressed a significant interest in ensuring that *bargaining unit* members are going to be working during a work stoppage to provide what the parties will have agreed are *the essential services* in the province. It is not simply a matter of agreeing that some number of employees will have to work, but rather, the precise positions of those needed must be identified, and who in those positions. It is therefore clear to the Board that the essential service workers agreed upon to work during a work stoppage are important to the overall goal of "enabling the employer to provide the essential services". That being the case, it seems obvious that if one of those workers is unable to perform the work for whatever reason, there must be some protocol in place to ensure that the employer has relatively quick access to another bargaining unit worker who would be able to provide the same apparently vital service.

39. The Board cannot accept the Crown's position that it can simply use "other persons". Section 32(2) specifically excludes consideration of other persons in arriving at the number of those bargaining unit members who are going to be *essential*. I cannot help but conclude that these sections are premised on a view that there is some precise number of bargaining unit members who are going to be key to the continued provision of essential services during a work stoppage.

40. The Board therefore directs the parties to negotiate as part of the essential service agreement a protocol to ensure that a designated bargaining unit essential service worker who is unable to attend at work can be replaced by another bargaining unit worker.

* * *

d) What happens if a person designated essential pursuant to an essential services agreement exercises his or her right under the *Occupational Health and Safety Act* to refuse to perform unsafe work

41. The parties agree that the *Occupational Health and Safety Act* ("OHSA") continues to operate in the workplace even if there is a labour dispute in progress. Hence, any essential service worker will continue to have the same rights she or he would normally have had pursuant to OHSA.

42. The employer position is that in accordance with the OHSA, it can replace a worker who makes a work refusal, so long as it does so in compliance with the provisions of that Act. Further, it argues that pursuant to section 41.1, it can use whoever it wishes to do the work in question. This is where the parties disagree. The OPSEU position is that who can be substituted to do the work of the refusing worker is a matter dependent on the terms of the essential services agreement. Thus, according to the union, the parties must develop a protocol to address who would replace a bargaining unit designated essential service worker.

43. The Board is in agreement with OPSEU on this issue. Once one accepts the premise that in negotiating the ESA the parties have had to agree on *how many* bargaining unit employees, from specific positions, are "necessary to enable the employer to provide the essential services", then the obvious implication of that is that without that number of persons from those positions the employer is not going to be able to provide the essential services. If that is the case, then if a bargaining unit employee who has been designated as essential exercises his or her right to refuse unsafe work, then it would be sensible for the parties to have worked out what the procedure will be to address the situation so that the employer continues to be able to provide the essential services.

44. The Board therefore directs that the Crown and OPSEU bargain as part of the essential service agreement a protocol for those situations where a designated essential service worker exercises the right to refuse unsafe work.

0195-98-PS District School Board of Niagara, Applicant v. The Canadian Union of Public Employees and its Locals 152, 468 and 1442, Ontario Public Service Employees Union, Local 260, Ontario Secondary School Teachers' Federation, Association of Professional Student Services Personnel, Responding Parties

Bargaining Unit - Public Sector Labour Relations Transition Act - Parties disputing whether 3 or 4 bargaining units appropriate for successor District School Board's operations - Board finding four units appropriate

BEFORE: *Inge M. Stamp*, Vice-Chair.

APPEARANCES: *Brenda Bowlby, Jim Brown, Dave Easton, Bonnie McArthur and Ann Gronski* for the applicant; *John Elder, Dan MacLean, Stan Brown, Dave Walters and Frank Ventresca* for CUPE; *Richard Blair, Connie Huziak, Jill Morgan, Tracey Mussat and Bridget Krajnak* for OPSEU; *Josh Phillips and Beverley Wilson* for the Ontario Secondary School Teachers' Federation ("OSSTF"); *Sandra Nicholson and Robin Tallon* for the Association of Professional Student Services Personnel ("APSSP").

DECISION OF THE BOARD; July 20, 1998

1. This is an application under the *Public Sector Labour Relations Transition Act, 1997* ("Bill 136"). Previous decisions have been issued by the Board in this matter on April 24, 1998 and May 8, 1998.
2. The District School Board of Niagara ("DSBN") is the new School Board, the result of the amalgamation of the Lincoln County Board of Education and the Niagara South Board of Education ("Lincoln" and "Niagara South").
3. The parties were unable to agree as to the number of bargaining units and a hearing was held to hear the submissions with respect to that issue. On the day of the hearing the applicant took the position there should be four bargaining units:
 1. Plant
 2. Professional
 3. Instructors
 4. Office/Clerical/Technical.
4. APSSP, OPSEU and OSSTF agree there should be four bargaining units. CUPE opposes this structure and asserts there should be three bargaining units, Plant, Instructors and Office/Clerical/Technical.
5. The plant unit was represented by CUPE at Lincoln and by CUPE Local 468 at Niagara South. It is agreed that CUPE will represent this unit at DSBN.
6. The professional unit was represented by APSSP at Niagara South. At Lincoln there was no separate professional unit. The persons performing this work were part of the office/clerical/technical bargaining unit represented by CUPE Local 1442.
7. The Instructors unit was represented by OSSTF at Niagara South. There was no bargaining agent representing persons performing that work at Lincoln.
8. CUPE argued that the professional/instructional support persons should be included in the CUPE office/clerical/technical bargaining unit at the new Board. It is CUPE's concern that the professional unit is a small unit in terms of numbers, approximately 43 after amalgamation, vs. CUPE's 700 in the office/clerical/technical unit. CUPE asserts, if the smaller unit prevails there would be no opportunity of movement within the bargaining unit as there is currently in the larger unit.
9. APSSP argued strenuously for its bargaining unit and opposes becoming part of CUPE. It is their view they do not have a great deal in common with the employees in the office/clerical/technical unit. It is APSSP's position that the qualification requirements would make upward mobility within that unit unlikely and it is not likely that there would be too much in the way of downward mobility.

10. The applicant in its brief described the professional unit as follows:

Professional Unit

all employees of the District School Board of Niagara in the District of Niagara regularly employed for not less than 17.5 hours per week in professional student services related to psychology, social work, interpreting and counselling, including, for the purposes of the clarity, the following:

Career Counsellor
 Interpreter
 Youth Counsellor/Case Worker
 Adjustment/Attendance Counsellor
 Skills Development Counsellor
 Speech Language Pathologist
 Assessment Counsellor (Psychometrist)

and excluding the Chief Psychologist, Supervisors and persons above the rank of Supervisor, teachers as defined by the *Education Act*, students employed during the summer months or on a co-op or work experience basis, or any other employee covered under another collective agreement.

11. Having considered all of the submissions of the parties, it is the Board's view that four bargaining units are appropriate as set out above. These are Plant, Professional, Instructors and Office/Clerical/Technical.

12. With the assistance of a Labour Relations Officer the parties reached agreement on a number of issues as follows:

Board File No. 0195-98-PS

Between:

District School Board of Niagara

Applicant

and

Canadian Union of Public Employees Local 152

and

Canadian Union of Public Employees Local 468

and

Canadian Union of Public Employees Local 1442

and

Ontario Public Service Employees Union

and

Association of Professional Student Services Personnel (Niagara Chapter)

and

Ontario Secondary School Teachers Federation

Responding Parties

The parties to the above matter agree to resolve their differences as follows:

1. This proceeding is an application to which the provisions of section 136 applies.
2.
 - (a) The parties agree that the instructors unit is as follows:

All employees of the District School Board of Niagara in the District of Niagara employed as Adult Basic Education Instructors and English As A Second Language Instructors in the Board's secondary panel, save and except Supervisors, persons above the rank of Supervisor, Teachers, as defined by the *Education Act*, Vice-Principals, and Principals, employees in a bargaining unit covered by existing collective agreements.
 - (b) The parties agree that the plant unit is as follows:

All employees of the District School Board of Niagara in the District of Niagara, regularly employed in plant operations, including care-taking and maintenance services and all bus drivers and cafeteria employees, save and except (assistant) supervisors and persons above the rank of (assistant) supervisor.
 - (c) The parties agree that the agreed bargaining unit in the office, technical and instructional support unit is as follows:

All employees of the District School Board of Niagara in the District of Niagara regularly employed as office, clerical, technical and instructional support staff, save and except

 - Supervisors and persons employed above the rank of Supervisor;
 - Department Managers, Assistants, Co-ordinators and persons above the rank of Department Manager;
 - Employees engaged as Vice-Principals, Principals or Department Heads;
 - Chief Accountant;
 - Board Lawyer;
 - All Human Resources Department employees employed in a managerial or confidential capacity and for the purposes of clarity those positions include:
 1. Recruitment and Equity Coordinator
 2. WCB Disability Management Coordinator
 3. Salary Benefits Coordinator
 4. Records Clerk
 5. Labour Relations Manager
 6. Assistant Superintendent
 7. Personnel Officer
 8. Benefits Administrator
 9. Secretary to the Asst. Superintendent

10. Secretary III
11. Recording Secretary
12. Secretary to the Board Lawyer
13. Students employed during the school vacation period

and pending resolution by the Board, excluding as well Secretaries/ Administrative Assistants to Supervisory Officers, Assistant Superintendent of Plant Services, excluding the secretaries to the Associate Director and Director of Education, Secretaries to the Property Manager, Budget and Accounting, Business Administrator, and Superintendent of Business,

and excluding as well on the same basis as above, the Payroll Control Clerk.

3. The parties agree to defer the dispute over the exclusion of persons regularly employed for less than 17.5 hours per week until after the representation vote. N.B. This refers to the Professional Unit only.
4. The parties also agree to and request that any votes arising out of this application be held in the third week of September (ie) commencing with Sept. 21st/98.

Dated at Toronto this 25th day of June 1998

"David Walters"
for CUPE

"Connie Huziak"
For OPSEU

"Bev Wilson"
For OSSTF

"Jim Brown"
For Applicant

"Roberta Tallon"
For APSSP

13. The parties have agreed the votes are to be held in the third week of September starting September 21, 1998. The parties have further agreed to meet with Board Officer Pat Whyte on July 24, 1998 to deal with vote arrangements, voters' lists and any issues arising out of this decision. The "Notice of Vote" will be issued after the parties have met with the Board Officer and agreed to the date, polling times, polling stations etc.

14. As stated earlier in this decision CUPE locals represented the plant bargaining units at Lincoln and at Niagara South. Having regard to the agreement referred to in paragraph 6 of this decision the Board appoints CUPE as the bargaining agent for the Plant unit at DSBN.

15. This matter is referred to the Registrar and the Manager of Field Services.

4462-97-JD United Brotherhood of Carpenters and Joiners of America, Local 1256 (“Carpenters”), Applicant v. **Doug Chalmers Construction Limited** (“Chalmers”) and Labourers’ International Union of North America, Local 1089 (“Labourers”), Responding Parties

Construction Industry - Jurisdictional Dispute - Carpenters’ union and Labourers’ union disputing assignment of tending work associated with erection and dismantling of scaffolding - Board holding that general tending work is *prima facie* in work jurisdiction of construction labourer, that all other tending work is within work jurisdiction of carpenter, that general tending work should be assigned to one or more construction labourers (unless there is insufficient general tending work required to keep a construction labourer occupied for a minimum of 4 hours in a working day) - Board also holding that an additional construction labourer must be assigned to perform general tending work when there is sufficient such work to keep the first labourer fully occupied for a full working day and there is additional work to fully occupy another labourer for an additional four hours - Board concluding that employer is free to assign additional construction labourers to perform general tending work as appropriate and that fact that amount of general tending work available is less than 4 hours worth of work does not mean that that work is within Carpenters’ work jurisdiction

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. G. Knight* and *G. McMenemy*.

APPEARANCES: *N.L. Jesin* and *R. Carlton* for the applicant; *G.F. Luborsky* and *Doug Chalmers* for Doug Chalmers Construction Limited; *A.M. Minsky* and *Robert Leone* for Labourers’ International Union of North America, Local 1089.

DECISION OF THE BOARD; July 2, 1998

I Introduction

1. This is a proceeding under section 99 of the *Labour Relations Act, 1995* concerning a dispute over the assignment of work; that is, a jurisdictional dispute.

2. The dispute between the parties concerns the assignment of tending work associated with the erection and dismantling of scaffolding. The particular dispute which led to this complaint arises out of grievances filed by the Labourers and referred to the Board under section 133 of the Act concerning the assignment of scaffolding work at several petro-chemical plant locations in Lambton County. Board File No. 1167-97-G is a grievance dated June 18, 1997 alleging a failure or refusal to employ members of the Labourers to tend carpenters on scaffolding work at Nova Corunna, contrary to the Labourers’ provincial agreement. Board File Nos. 1168-97-G, 1169-97-G, 1170-97-G, 1171-97-G and 1459-97-G are identical grievances dated May 21, 1997, June 24, 1997, June 27, 1997, June 16, 1997, July 23, 1997 and September 26, 1997 respectively; alleging the same breach of the Labourers’ provincial agreement at H.C. Starck Bayer and Nova Corunna, Imperial Oil, Nova (Sarnia), Imperial Oil Plant #3, and Cabot Canada, respectively.

3. But the dispute is broader and less contained than those particular grievances or assignments of work. There is a history to the dispute between the parties which goes back to 1991, and which includes two previous jurisdictional dispute proceedings at the Board, one of which raised substantially the same issue which is before the Board in this case.

4. Grievances referred to the Board in 1991 (Board File No. 2315-91-G) and 1992 (Board File No. 3453-91-G) alleged that Chalmers' failure to assign "labourers work" on scaffolding erected or dismantled by Suncor constituted a violation of the Labourers' provincial agreement. These led to the jurisdictional dispute proceedings in Board File No. 2214-92-JD. A differently constituted panel of the Board disposed of that matter by decision dated January 29, 1993. The Board described the dispute in that case as follows:

3. The nature of the dispute can be briefly summarized as follows. Doug Chalmers Construction Limited ("Chalmers") was involved in performing certain maintenance work on what we will refer to as the Suncor project at Sarnia, Ontario. The work in dispute can be described as the handling (from base of scaffolding), erection and dismantling of scaffolding at the Suncor project. Chalmers assigned the erection and the dismantling of scaffolding to members of the United Brotherhood of Carpenters and Joiners of America, Local 1256. Local 1089 contends that this work should have been assigned on a composite crew basis to labourers and carpenters.

The Board determined that "the erection and dismantling of scaffolding shall be assigned to carpenters, with labourers tending."

5. Also by decision dated January 29, 1993, the same panel of the Board dealt with another jurisdictional dispute (Board File No. 2213-92-JD) involving a different employer (Catalytic Maintenance Inc.) in which the issue was substantially the same. The Board issued an identical final order.

6. This is significant only because of what happened next. First, the Labourers', without the participation of or notice to the Carpenters, entered into a Memorandum of Understanding with each of Delta Catalytic Industrial Services Ltd. (which presumably is the same or a related entity to Catalytic Maintenance Inc.), and another with Chalmers. Although similar, these agreements are not the same.

7. The agreement with Delta Catalytic is dated March 19, 1993 and provides as follows:

MEMORANDUM OF UNDERSTANDING

BETWEEN:

Delta Catalytic Industrial Services Ltd.

and

Labourers International Union of North America (LIUNA) Local 1089 - Sarnia

In an effort to interpret the Labour Relations Board decision (OLRB) of January 29th, 1993, file # 2213-92-JD re Jurisdictional Dispute between Carpenters Local 1256 and Labourers Local 1089 on the handling (from base of scaffolding), erection and dismantling of scaffolding.

The Company will take the following criteria into consideration in the assignment of work.

1. Cost and efficiency
2. Productivity of work crews

The Company makes the following assignments:

The following outlines the general manner in which scaffolding will be handled, erected and dismantled:

1. The erection and dismantling of scaffolding will be assigned to Carpenters, with Labourers tending.
2. It is agreed, that it is Labourers jurisdiction to establish all scaffold material stock piles,

handling from stockpiles which includes carry by hand, loading and off loading, tying on/or off of scaffold material to the point of erection.

3. At the base of scaffold, it is agreed that Labourers will hand and/or tie on scaffold materials and the Carpenter will draw up from the top of the scaffold.

In those job circumstances where the above outlined assignment is not practical and efficiency is compromised the following procedure will apply.

1. On any low level scaffolding where the job requires only two people, the handling, erection and dismantling will be performed on a composite crew basis. (Carpenters/Labourers) Should the job require additional manpower either in the handling or the erection/dismantling portions, those additional forces will be determined and supplemented by the employer.
2. This assignment supersedes all previous company correspondence [sic] pertaining to scaffolding.

Signed this 19th day in March, 1993

("Illegible Signature")
FOR THE COMPANY

("Robert Leone")
FOR THE UNION

8. The Agreement with Chalmers is dated April 13, 1993 and provides that:

Memorandum of Understanding

Between:

Chalmers Construction Ltd.

And

Local Union 1089

In an effort to interpret the Labour Relations Board decision (OLRB) of January 29th, 1993, file 2214-92-JD re-Jurisdictional Dispute between Carpenters Local 1256 and Labourers Local 1089 on the handling (from base of scaffolding) erection and dismantling of scaffold, the parties hereby agree as follows:

The Company will take the following criteria into consideration in the assignment of work.

- 1) Cost and efficiency
- 2) Productivity of work crews

Subject to the foregoing and any overriding jurisdiction of any trade, the following outlines the general manner in which scaffolding will be tended, erected and dismantled.

- 1) The erection and dismantling of scaffold will be assigned to Carpenters, with Labourers tending.
- 2) It is agreed that it is Labourers jurisdiction to establish all scaffold material stock piles, handling from stockpiles which includes carrying by hand, loading and off loading, tying on/or off of scaffold material to point of erection.
- 3) It is agreed that at the base of the scaffold Labourers will hand and/or tie on scaffold materials and the Carpenters will draw up from top of the scaffold.

Both parties agree to act in good faith in the application of this document and agree that should any dispute arise in its interpretation the parties will meet immediately to resolve same.

In consideration of the foregoing the Union hereby agrees to advise the Ontario Labour Relations Board that its grievance dated December 13, 1991 (Board File No. 3453-91-G) will be adjourned sine die, and that its grievance dated October 29, 1992 (Board File No. 3259-92-G) and November 4, 1992 (Board File No. 3260-92-G) are withdrawn.

Dated: April 7, 1993.

For the Company
("Doug Chalmers")

For the Union
("Robert Leone")

9. Unfortunately, neither the jurisdictional dispute proceedings in Board File No. 2214-92-JD, nor the subsequent April 13, 1993 agreement between the Labourers and Chalmers resolved the dispute between the parties regarding the assignment of tending work associated with the erection or dismantling of scaffolding. Since the Carpenters were not party to the April 13, 1993 agreement, this is not particularly surprising. Further grievances (Board File Nos. 0496-96-G and 0497-96-G) and an application under section 96(7) of the Act (Board File No. 0498-96-U) were filed by the Labourers.

10. These led directly to another jurisdictional dispute complaint in Board File No. 1450-96-JD which was considered and determined by another panel of the Board, which the Vice-Chair herein also chaired. A decision issued in that matter on May 8, 1997 (reported as *Doug Chalmers Construction Limited*, [1997] OLRB Rep. May/June 385). That jurisdictional dispute concerned two things:

- (a) the assignment of the work of tending carpenters working on scaffolding at five "projects" at Suncor, Imperial Oil, Shell Oil and Nova (Petrosar) in Sarnia;
- (b) the supervision of that tending work.

The erection and dismantling of scaffolding was *not* in issue in that case.

11. By majority decision in *Doug Chalmers Construction Limited*, *supra*, the Board directed Chalmers to assign at least one construction labourer to tend carpenters on all scaffolding "*jobs*" in issue, and specified that the employer could add additional labourers to tend carpenters as it considered appropriate. The majority of the Board declined to disturb the assignment of tending supervision which Chalmers had made. The Board also declined Chalmers' request to make directions or orders affecting future assignments of work.

12. This still did not end the matter, and within months the grievances referred to in paragraph 2, above, were delivered, against the backdrop of Chalmers and the Labourers accusing each other of all manner of things, including refusing to accept or comply with the Board's decision in *Doug Chalmers Construction Limited*, *supra*.

13. When the parties came before the Board with respect to the various outstanding grievances, it was apparent that the real dispute between them continued to focus on the assignment of tending work associated with the erection or dismantling of scaffolding. The parties agreed to give the Board an opportunity to try to mediate the dispute instead of plunging ahead with litigation. To facilitate this process, and to decrease the number of distractions, the Board ordered a moratorium of all "Chalmers' litigation", without prejudice to the right of any of the parties in that respect. This moratorium expired on June 1, 1998.

14. The mediation process was unsuccessful. The issues were clarified and positions crystallized, but a settlement could not be achieved. The Board therefore directed that the dispute enter a litigation mode, with the Carpenters as the nominal applicant to facilitate the process. The Board was hopeful that further mediation opportunities might be revealed, but that did not occur.

15. The Board dealt with some preliminary and procedural matters on April 30, 1998 (see decision dated May 4th, 1998), and subsequently convened a consultation on May 11, 1998. Because of what had occurred in the consultation and after the decision in *Doug Chalmers Construction Limited, supra*, the Board considered whether there was any issue with respect to which it wished to hear evidence or further representations. By a decision dated May 14, 1998, the Board advised the parties that it had concluded that no evidence or further representations were necessary.

II Decision, Part 1: Positions of the Parties

16. The parties, particularly Chalmers and the Labourers, spent some time arguing the meaning of the Board's decision in *Doug Chalmers Construction Limited, supra*. The Labourers ended up in effect asserting that what it was seeking was an affirmation of that previous decision. That is, the Labourers seek the same result, although in a "clarified" form.

17. The employer's understanding of the decision in *Doug Chalmers Construction Limited, supra*, is manifestly wrong, and frankly, difficult to understand, given the company's own written representations and supporting materials in that proceeding. (The parties agreed that all materials filed in both of the early jurisdictional dispute proceedings in which they were also involved are also properly before the Board in this case.)

18. To the extent that Chalmers' position concerning the meaning of the Board's decision in *Doug Chalmers Construction Limited, supra*, suggests that the company relied upon the management Board Member's dissent in that case, it should not have, and this case demonstrates why it is dangerous to rely on a dissent as an aid to interpreting a decision of the Board.

19. A dissent is in itself a separate decision. It is a decision which disagrees, in whole or in part, with the decision of the majority in the case. It indicates that the dissenter has come to a different decision than the majority, and that s/he considers the majority decision to be incorrect, at least in part. A dissent generally sets out the area(s) of disagreement with the majority decision, and the decision which the dissenter has concluded is the appropriate one. However, the majority decision is the decision of the Board and it speaks for itself. Whatever a dissent may say about it, it is not generally appropriate to use a dissent as an aid to interpreting a majority decision. A dissenting decision or opinion is just that, and it cannot operate to affect, "put a gloss on", or give meaning to the majority/Board's decision.

20. In his dissenting decision in *Doug Chalmers Construction Limited, supra*, Board Member Reaume states that he dissents "although it places the least possible infringement on Chalmers' right to assign tending work based on cost and efficiency in connection with the erection and dismantling of scaffolding." That was his view of the effect on the company of the Board's decision. The Board's decision does not indicate that the Board intended or considered that to be the effect of its decision.

21. In any event, Chalmers apparently determined that the Board's decision in *Doug Chalmers Construction Limited, supra*, did not require the company to assign a construction labourer to tend carpenters on every scaffold. Instead, Chalmers gave itself the benefit of its own very liberal interpretation of the decision, and appears to have carried on very much as it had before. The Labourers, on the other hand, interpreted that decision as requiring the employer to assign at least one construction labourer to tend carpenters on each individual scaffold.

22. With respect, the Labourers' understanding of the Board's decision in *Doug Chalmers Construction Limited*, *supra*, is correct.

23. First of all, in paragraph 5 of Schedule "B" of the Brief filed by Chalmers in that previous proceeding, the company itself asserted that a job consists of an individual scaffold as follows:

... As a matter of industry practice, through a recognized tagging procedure, *each scaffold is considered an individual job*. A scaffolding job may be as simple as one or two Carpenters with no Labourers performing all of the work on the specific job, or it may require several Carpenters with or without Labourers or other trades groups performing tending functions. In response to the grievances and complaints of Local 1089, Chalmers specifically states:

- (a) that with respect to the "tending carpenters" dispute, for reasons of economy and efficiency, and consistent with area/industry practice as well as Chalmers' past practice, Chalmers does **not** utilize the services of Labourers in all tending work, but rather, given the diversity of scaffold jobs, the Carpenters themselves may be assigned to tend to their own needs (or, in some cases members of the Teamsters Union and/or Operating Engineers perform tending functions); and

[emphasis added]

24. Second, the only reasonable interpretation of the materials filed by Chalmers in support of its position in the earlier case, and specifically the documents at Tab 6 of the Company's Supplementary Documents Book #4, is that these present individual scaffolds; that is, that a scaffolding job consists of one scaffold. It is quite conceivable that Chalmers could, as its materials in that case suggested, have erected 2,394 scaffolds over the approximately 3 1/3 years the materials covered. It is equally inconceivable that Chalmers had that many projects, some significant number of which consisted of more than one scaffold, during the same period.

25. It is apparent that the Board adopted the employer's own position regarding what a job was, and used the employer's own pleadings and documents in arriving at its (majority) decision. It is clear that the Board drew a distinction between "projects", at which more than one scaffold could be erected and dismantled, and individual scaffolding "jobs" (see and compare paragraph 4 to paragraphs 34 to 36 in *Doug Chalmers Construction Limited*, *supra*). While an individual scaffolding job can constitute a project, it is not necessarily the case that every project consists of a single job. Indeed, the materials suggest the contrary; that is, that a single scaffolding "project" may consist of any number of individual scaffolding "jobs". In the context of this jurisdictional dispute, "project" and "job" are not equivalent terms.

26. Fourth, even the dissent in *Doug Chalmers Construction Limited*, *supra*, accepted or adopted the majority's approach. In paragraph 6, for example, Board Member Reaume wrote that the Board decision "... now requires Chalmers to use at least one labourer to tend all scaffolding erection and dismantling *jobs* [not "projects"] *regardless of cost and efficiency ...*" [emphasis added].

27. The Labourers are absolutely right. The Board's decision in *Doug Chalmers Construction Limited*, *supra*, required Chalmers to assign at least one labourer to tend carpenters on every individual scaffold.

28. However, we do not accept the Labourers' submission that that is determinative of the jurisdictional dispute herein. It is worth recalling that the Board in *Doug Chalmers Construction Limited*, *supra*, expressed concerns regarding the focus and sufficiency of the materials before it in that case. At paragraphs 32 and 33 of the majority decision, the Board wrote that:

32. The Board's first impression was that the parties had perhaps failed to focus on the particular work in dispute in the work assignments which prompted the grievances which led to this jurisdictional dispute complaint. However, these parties are all experienced in jurisdictional dispute complaints, and all of them were represented by experienced labour relations counsel. Because of this, and because no one suggested that the Board should hear evidence or is otherwise unable to decide the issue on the basis of the materials filed, the Board reviewed the materials again.

33. As we did so, it struck us that the parties had spent no time on the types of scaffolding, on the materials used, or on the environment in which scaffolding was erected or dismantled. On the contrary, in one way or another in their employer and area practice materials, the parties have focused entirely on the number of carpenters engaged to perform the erection or dismantling. The Labourers' materials focus on the number of carpenters and the number of labourers relative thereto. The Carpenters' materials focus on erection and dismantling work, which is *not* part of the work in dispute in this complaint, but to the extent that these materials relate to tending work they do so on the basis of the number of carpenters (or apprentices). Chalmers' materials deal with the issue of the number of hours worked by carpenters, relative to the number of hours worked by labourers. There appears to be no reason why this cannot be translated into roughly equivalent numbers of carpenters and labourers. Accordingly, it appears that this is also the appropriate way to approach the dispute in this case.

29. In this proceeding, the parties have tried to address those concerns, and also the questions asked by the Vice-Chair sitting alone herein in paragraph 4 of a decision dated April 1, 1998 issued in the context of this proceeding. Still, the positions of the parties in this proceeding closely mirror their respective positions in *Doug Chalmers Construction Limited, supra*, except that it appears that Chalmers and the Labourers have switched positions on what constitutes a scaffolding "job". It is now the Labourers who say that each scaffold is a job, while Chalmers takes the clearly untenable position that a job is all of the scaffolding work required under a contract.

30. Further, Chalmers, as it did in the earlier case, again pleads for finality, and that it be given a broad discretion with respect to assigning the work in dispute. The two unions also seek closure, but they disagree with Chalmers and each other on how that can be achieved.

31. To the extent that the employer seeks a decision which will be determinative of other or future work assignments, we reiterate the Board's comments in paragraphs 6 to 9 of the May 8, 1997 decision in *Doug Chalmers Construction Limited, supra*. Having said that, it is worth noting that although as a technical matter the Board may no longer have the specific jurisdiction to make directions concerning work assignments which are not specifically before it, as a practical matter, the Board's determination of a jurisdictional dispute will have the same effect such a decision has always had. The effect of a Board determination of a jurisdictional dispute will generally not be limited to the work assignment(s) in dispute in the particular case. The Board's jurisdictional dispute decisions will continue to have the impact on subsequent work assignments or cases that they have always had. Accordingly, where a jurisdictional dispute complaint between the same parties concerns an assignment of work which is the same, or substantially the same as one which has previously been determined by the Board, a party which seeks a different result is likely to encounter significant difficulty in that respect, unless it can persuade the Board that there is either good reason to doubt the correctness of the previous determination, or that there is some cogent reason to think that the previous determination should not be considered to be dispositive of the matter. This is particularly so, where the previously determined jurisdictional dispute is relatively recent, and involved the same parties in the same geographic area.

32. In this case, the parties all ask the Board to take a second look at the same jurisdictional dispute which was before the Board in *Doug Chalmers Construction Limited, supra*, only a year ago. The parties have had every opportunity to consider the earlier decision and its effect, and to re-state their positions in light of that earlier determination. Any party which seeks to bring the same dispute before the Board after the Board issues its decision in this case will therefore have to explain to the

Board why it should be given other than short shrift. In that respect, as a purely technical matter, it may be that the concepts of *res judicata* or issue estoppel do not apply where a different assignment of work is being disputed, but it is far from clear why the Board could not take an analogous approach where the work assignments in question concern the same work, the same parties, and the same geographic area.

33. Nevertheless, having regard to the peculiar and unique history of the jurisdictional dispute between the parties, and because the previous proceedings have not resolved the real dispute, the nature and extent of which has been clarified for all concerned in this proceeding, the Board considers this to be one of those rare cases in which it is appropriate to take a "second look".

III Decision, Part 2: Merits

34. We see no reason to doubt the correctness of the Board's reasoning and conclusion in paragraph 10 of the decision in *Doug Chalmers Construction Limited*, *supra*, that it would be inappropriate for the Board to clothe an employer with an absolute and unfettered discretion to assign work as it pleases (assuming that the Board even has the jurisdiction to do so). This is not to say that an employer like Chalmers should not have some discretion, but rather that its discretion is limited by a reconciliation of the competing work jurisdictions claimed by the (in this case, two) trade unions. In the construction industry work jurisdictions are the concrete expression of the bargaining rights which unions hold.

35. The Board's recitation of how it approaches jurisdictional disputes has achieved almost "boilerplate" status. Nevertheless, it is worth repeating paragraphs 12 to 16 of *Doug Chalmers Construction Limited*, *supra*, if only for ease of reference:

12. It is neither possible nor appropriate to describe an exhaustive list of factors which are considered, or to construct or mechanically apply some formula or checklist in that respect. Notwithstanding this, the Board has developed a general approach, which has withstood the test of time and which has been accepted in the construction industry, involving the use of several broad factors which the Board will consider in determining a jurisdictional dispute complaint. These factors were first set out in *Canada Millwrights Ltd.*, [1967] OLRB Rep. May 195, as follows:

- trade union constitutions and collective agreements
- trade agreements between the competing parties
- area practice
- employer practice and preference
- safety, skill and training
- economy and efficiency

For almost thirty years, the Board's approach to jurisdictional dispute complaints has involved an assessment of these six factors. However, the Board's jurisprudence also demonstrates the Board's willingness to consider anything which it is satisfied is relevant to the determination of a particular jurisdictional dispute complaint. Accordingly, the six factors identified as aforesaid do not constitute an exhaustive list. Nor does the order in which the factors are listed or considered indicate the weight which may be given to any of them in a particular case. Indeed, in a given case some factors will be of little or no assistance, while in another case they or one of them may be determinative. For example, in recent years, the work jurisdictions asserted by construction trade unions in their respective constitutions and collective agreements have become so broad that they are often of little assistance, particularly when the work in dispute is not part of the core of a trade's work jurisdiction, and, as is generally the case, the employer concerned is bound to collective agreements which cover the work in dispute with all of the competing trade unions.

13. Because of the historical development of the division of work in the construction industry on a craft or trade basis, and the overlap between the construction trades and the work jurisdictions which they assert, the Board has recognized that collective bargaining relationships, by themselves, will generally not be determinative of a jurisdictional dispute complaint. Consequently, while a trade union which has no applicable collective agreement with the employer which assigned the work in dispute is likely to have a difficult time having the assignment altered, a trade union which has a collective agreement with the assigning employer will not necessarily be successful in fending off a claim for work by a trade union which has no collective agreement with that employer (*Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143; *Pigott Construction Limited*, [1992] OLRB Rep. June 748 ("Pigott #2"); and see *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846 with respect to the difficulties which a trade union without a collective agreement will face), so long as the issue is one of work jurisdiction and not one of representation (*Simcoe Mechanical Contracting Ltd.*, [1982] OLRB Rep. Sept. 1352).

14. Similarly, although it will equally often not be the case, a single factor may be determinative of a jurisdictional dispute complaint. Work jurisdiction trade agreements provide one example of the factor to which the Board has given great weight (especially in recent cases: *Pigott #2*, *supra*; *Ellis-Don Limited*, [1993] OLRB Rep. Nov. 1130, the various decisions in *Kora Mechanical Inc.*, [1992] OLRB Rep. June 740 and decisions dated March 3, 1993, April 26, 1993, June 14, 1993, July 12, 1993 and November 8, 1993, all unreported; but see *Groff & Associates Ltd.*, *supra*, where the Board declined to give effect to a trade agreement in circumstances where the established area practice in the relevant geographic area was inconsistent with the trade agreement).

15. Similarly, although the Board has determined jurisdictional dispute complaints in favour of a trade union which area practice did not favour, (*Simcoe Mechanical Contracting Ltd.*, *supra*; *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185), area practice has more and more often been a determining factor (*Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775; *Acco Canadian Material Handling*, *supra*). Indeed, in *Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915, the Board observed that "it is the rare and unusual complaint in which the Board does not attach significant and primary significance to area and employer past practice ...", and also that "... the real crux of most jurisdictional disputes revolves around the two past practice criteria." The emphasis on past practice is reflected in the time and energy devoted to the practice factors in jurisdictional dispute proceedings before the Board.

16. The Board has developed its approach to construction industry jurisdictional disputes having regard to the nature and organization of the construction industry (on both the employer and trade union sides), which is predominately on a "local" geographic basis which tends to mirror the geographic jurisdictions of construction local trade unions. Of course, the Board does not blindly adhere to single (local) area practice. In an appropriate case, the Board will look to an "industry practice" which is specific to the particular work in dispute but in a broader geographic area (*Foster-Wheeler Limited*, *supra*), to jurisdictions of competing trade unions which extend beyond the established Board areas or which are not congruent (*Commonwealth Construction Company*, *supra*). Cases such as this should not be taken to be anything more than the exceptions to the general rule which they are. They merely underline the Board's willingness to take special circumstances into account in particular cases, and to approach jurisdictional dispute complaints on a case specific basis.

36. We emphasize that this accurately describes the Board's *general* approach. But as even that general approach specifically recognizes, the Board stands ready to consider whether a particular case merits a modified or different approach. This appears to be such a case.

37. The materials filed in *Doug Chalmers Construction Limited*, *supra* (which we have already noted are also before the Board in this case) included a substantial amount of information concerning area and employer practice. It is apparent that these materials are incomplete. Similarly, the additional practice materials filed in this proceeding do not include all of the available information in that respect. The Labourers, for example, have specifically stated that they have further practice materials available.

38. However, as we indicated in our May 14, 1998 decision, the Board is satisfied that it is appropriate to determine this matter without evidence, or further materials or representations from the parties.

39. Two things are apparent from the materials and representations which are before the Board.

40. It may be possible to categorize scaffolds into classifications delineated according to the size and type of scaffolding, and the environment in which scaffolding work is being performed. However, it is equally apparent from the materials that there would be a large and potentially unlimited number of such classifications. This suggests that there is little to be gained by approaching this jurisdictional dispute by emphasizing area or employer practice. Indeed, the failure of the Board's decision in *Doug Chalmers Construction Limited, supra* (which took that approach) to resolve the dispute demonstrates that there is little practical or predictive value to such an approach.

41. The approach which the parties have taken to the dispute in this proceeding suggests that they recognize this, at least implicitly. This would explain why the Board still has virtually nothing before it regarding the size or type of scaffolding or the environment in which the scaffolding work which gave rise to the specific grievances which are at the root of this proceeding, notwithstanding the Board's comments in paragraphs 32 and 33 of the *Doug Chalmers Construction Limited, supra* decision, and the parties avowed attempt to address those concerns in this case. It would also explain why notwithstanding the debate in which they engaged concerning the utility of the various statistics included in the materials, the parties all pointed to these in different ways and suggested that the numbers provided support their respective positions.

42. That is, the parties have implicitly recognized that it cannot be said that "a scaffold is a scaffold", that it is difficult to compare scaffolding jobs (i.e. one scaffold to another), and that it is therefore futile to attempt to resolve the jurisdictional dispute between the two trade unions on the basis of the particular scaffolding work with respect to which the various grievances have been filed. Instead, the parties have taken a more general approach to the jurisdictional dispute, an approach which recognizes the generic nature of the problem, and which cries out for a concomitant generic resolution.

43. With respect, we consider such a general approach to be the appropriate one in this jurisdictional dispute. The dispute clearly transcends individual jobs, and a determination of the dispute which is restricted to specific individual jobs would be both of little use to anyone, and would do virtually nothing to actually resolve the jurisdictional dispute between the two unions. On the other hand, the more general approach is more practical, more directly addresses the real dispute between the parties, and therefore makes more labour relations sense. It will certainly make it more difficult for any party which wishes to continue the dispute to do so, and will provide a clear structure within which the parties can (and hopefully will) work to repair the damage that this dispute has done to their relationship.

44. That being the case, the Board is satisfied that making further inquiries into the area practice factor, for example, would not be a useful exercise. It is unlikely that the historical practice could be broken down by the size, type and work environment of scaffolding work in any useful way, or at all. Second, it seems unlikely that any further practice materials would reveal anything different from the materials which are already before the Board. Third, it is apparent that there have been developments in scaffolding "technology" or systems which raise questions concerning the cogency of past practice information which is more than a few years old. Fourth, the more fundamental or generic nature of this jurisdictional dispute, and the fact that a general approach appears to be the most appropriate one to take, makes the detailed area practice approach which is adopted in many jurisdictional disputes proceedings less useful in this case.

45. Upon further consideration, and in light of the further materials filed herein, the statistical approach taken in *Doug Chalmers Construction Limited, supra*, appears to have dubious value except as an indicator of general trends and something against which the other factors can be measured.

46. To repeat, the work in dispute, or what this jurisdictional dispute is all about, is the tending of carpenters who are erecting or dismantling scaffolding. The ordinary meaning of the verb “to tend” is “taking care of, looking after” something or someone. So what we are dealing with is the work of construction labourers “looking after” the needs of carpenters engaged in erecting or dismantling scaffolding. There was a dispute in this case about what construction labourers can or should be able to do in that respect. This raises questions of economy, efficiency, ability and safety. It also raises questions concerning what tending in this context consists of, where it begins and ends, and where the work jurisdictions of construction labourers and carpenters intersect, as they clearly do. This is one of those difficult cases in which there is no obvious bright line between the two trade jurisdictions.

47. Chalmers continues to take the position that it ought to be able to organize and assign the work in dispute in the manner in which the company considers to be the most economical and efficient. In that respect, Chalmers says that it is neither necessary nor appropriate to require the company to employ construction labourers to tend carpenters on every individual scaffold, particularly those which are erected or dismantled by crews of two or three carpenters. Indeed, the company submits that its competitive position will be severely eroded if it is required to do so. Chalmers submits that there is a “self” or “trade tending” component to the work carpenters do on scaffolding, and that such self-tending is sometimes the only tending work which is required, particularly under the ISO9002 scaffolding program in systems scaffolding which is becoming the method and material of choice in its operations.

48. Chalmers asserts that the Labourers “minimum manning” approach is both overly simplistic, and failed to recognize the evolution and realities of modern scaffolding construction. Such an approach, says the company, would result in significant “feather bedding” for construction labourers at the company’s expense, and ultimately to the detriment of all parties. Further, Chalmers submits that the Board’s jurisdiction is limited to determining who the work in dispute should be assigned to, and not how many employees should be assigned to do it. The Carpenters’ position of course is very much aligned to Chalmers, although the Carpenters is leery of giving the company the broad discretion it seeks. Ultimately, the Carpenters’ position can be simply stated: the company should be required to assign tending work to construction labourers when there is sufficient work to occupy a labourer full time, and that what counsel referred to as “incidental bits” of tending work should be performed by the Carpenters themselves as part of the scaffolding work they perform.

49. Both Chalmers and the Carpenters point out that carpenters are the more expensive employees (in terms of wages and benefits), so that this is not a case of a trade or trade union trying to buy jurisdiction.

50. Although the Labourers begin by saying it is happy with the *Doug Chalmers Construction Limited, supra*, decision, ultimately it wants more. It submits that *all* tending work, however small in quantity should be assigned to construction labourers because that is part of the core jurisdiction the construction labourer. However, apparently unable to conceive another response to the “feather bedding” concern expressed by the company, the Labourers suggest that the construction labourers assigned to tend the carpenters could perhaps assist or participate in the erection or dismantling work in order to fill any time not occupied with tending work. That is not a possible outcome in this case. Erection and dismantling work is not part of the work in dispute and it is not otherwise “up for grabs”. As a result of the decisions in Board File Nos. 2213-92-JD and 2214-92-JD, the Labourers have no claim to erection or dismantling of scaffolding assigned by Chalmers in Lambton County (Board Area #2).

51. The work in dispute is the tending of carpenters for erecting or dismantling scaffolding. "Tending" consists of looking after the needs of carpenters in that respect (see paragraph 46, above). In the context of this case, any handling of material from the delivery drop point to the point of use by the Carpenters is tending. The handling of material after the point of first use by the carpenters may or may not be tending. If the handling beyond the point of first use is integral to the carpenters' erection or dismantling functions it is either not tending at all, or it is a tending, whether properly called self-tending or not, which is part of the carpenters' work jurisdiction. That is, not all handling of materials is tending work which is in the construction labourers' work jurisdiction. The construction labourers' tending work jurisdiction is limited to the tending functions which are severable from the erection and dismantling work performed by the carpenter. This is consistent with the Board's decision in *Ecodyne Limited*, [1997] OLRB Rep. Mar./Apr. 197 where the Board determined that "the work of tending the pairs of carpenters", which appears to have been in the nature of general tending work, should have been assigned to construction labourers.

52. The amount of construction labourer tending work associated with a particular scaffolding "job" (which consists of all of the work associated with the erection and dismantling of an individual scaffold) will depend on the kind, size and components of the scaffold, and the environment in which the scaffold is being erected or dismantled. Accordingly, there may be much or very little construction labourer tending work associated with the scaffolding job, perhaps as little as none.

53. This approach to tending is entirely consistent with the Board's conclusions in *Doug Chalmers Construction Limited*, *supra*, although it does require an extension of the analysis in order to obtain a result which is a reasonable reconciliation of the work jurisdictions of the two unions.

54. As the Board pointed out in *Doug Chalmers Construction Limited*, *supra*, this jurisdictional dispute involves the Labourers and Carpenters' provincial (ICI) agreements. These are the collective agreements under which the two unions assert their respective work jurisdictions and which must be reconciled. Both provincial agreements assert a tending jurisdiction (as do both union constitutions). Paragraph 30 of the *Doug Chalmers Construction Limited*, *supra*, decision, the Board went on to say that:

30. Nevertheless, there is a difference between the jurisdictional claims of the Labourers and Carpenters as expressed in their respective constitutions and provincial agreements. It is apparent that tending work associated with many other trades, including carpenters, is part of the core of the work jurisdiction claimed and exercised by construction labourers represented by the Labourers' union. On the other hand, tending work is not at the core of the work jurisdiction of the Carpenters' union, although it is work which is necessarily incidental to and not far from that core jurisdiction. Accordingly, the collective agreement/constitutional factor slightly favours the claim of the Labourers.

With the benefit of the additional materials and representations in this proceeding, and upon further consideration, this statement appears to be not entirely accurate. It is accurate to say that tending of various trades, including the trade of carpenter, is an important part of the work jurisdiction of the construction labourer, and that is at the core of that work jurisdiction. However, it is not entirely fair to say that tending work is not also at the core of the carpenter's work jurisdiction. As such, "tending", in the sense of what construction labourers do, is not part of the carpenters' work jurisdiction at all. However, there is a tending aspect to that work jurisdiction; namely, the handling of material which is not severable from, in this case, the erection and dismantling of scaffolding by carpenters. The issue is not one of overlap between the two work jurisdictions but rather where one ends and the other begins. Accordingly, neither is it a matter of expanding or shrinking the tending jurisdiction of the construction labourer, but rather discerning what work falls within that jurisdiction. The fact that a construction trade union claims or clearly has jurisdiction over certain work is no guarantee of the amount of work which may be found within that jurisdiction at any given time. The jurisprudence demonstrates that a particular

trade's work jurisdiction may not be uniform across the province, and that the boundaries of that work jurisdiction may change over time, again not necessarily in the same way or to the same extent in every part of the province. However, whatever the boundaries of a trade's work jurisdiction are at any particular time, and even if those boundaries do not change, the amount of work within that jurisdiction will inevitably be a variable thing. As it happens, this case raises both issues; namely:

- (a) what is the tending jurisdiction of the construction labourer with respect to the erection and dismantling of scaffolding? and
- (b) how much work is there in it in Lambton County?

55. The first question is what most jurisdictional disputes are about. The second does not arise often, or is unnecessary to determine, and is much more difficult to answer.

56. In this case, the collective agreement factor favours the Labourers' claim to what might fairly be called the general tending work associated with the erection and dismantling of scaffolding. However, when it comes to tending work which cannot rationally be severed from the erection and dismantling functions which carpenters perform, the collective agreement favours the claim of the Carpenters. In the Board's view, erection and dismantling functions include any necessary fabrication and inspection work, and non-operating engineers' hoisting at the scaffold itself.

57. When it comes to employer and area practice, the Board's comments at paragraph 31 of the *Doug Chalmers Construction Limited, supra*, decision are equally applicable here. Of course, as was the case in that proceeding, further analysis is required. Having been given the benefit of the further materials and representations of the parties in this proceeding, the Board is not prepared to give the same weight to the statistical analysis that the Board engaged in *Doug Chalmers Construction Limited, supra*. This is not to say that the available statistics offer no assistance, but the nature of scaffolding, with the variations in size and environment, make them useful only as a general indicator. Further, there are two ways in which one can look at the statistics. Taking the statistics which the Board looked at in *Doug Chalmers Construction Limited, supra* (at paragraphs 34 to 36), one can say, as the Board did in that case, that the dominant ratio suggested by the practice materials is one labourer for every two carpenters, and that even Chalmers has historically used at least one labourer on 80% of all of its scaffolding jobs. On the other hand, in 30% of its scaffolding jobs, Chalmers has used either one or no labourers regardless of the number of carpenters on the scaffold. Further, while the company's three person scaffolding crews either included or required a labourer in addition to the carpenters on approximately 50% of its scaffolding jobs, that was equally often not the case. Indeed, all of the materials, including those which the Labourers have filed in this and the previous proceedings, suggest that a ratio approach is inappropriate, and the fact that one may be able to calculate a series of ratios from the statistics is a statistical fortuity, which upon closer inspection demonstrates the unreliability of the statistical approach. The statistical approach does not take into account the idiosyncrasies of individual jobs, which all of the materials before the Board suggest are the most significant determinant of the amount of construction labourer tending work which is associated with a particular job (scaffold). Further, the practice materials taken as a whole, including those filed by the Labourers, suggest that the ratio approach inevitably suggested by statistical analysis is not appropriate.

58. The same purported "trade agreement" which was before it in the previous litigation is also before the Board in this case, although the parties paid scant attention to it during the consultation. For the reasons given in paragraph 38 of *Doug Chalmers Construction Limited, supra*, the Board can give no weight to this agreement. It is apparent that events have overtaken and left it behind.

59. Chalmers and the Labourers both point to the April 7, 1992 Memorandum of Understanding between them in support of their respective positions. Although at pains to point out that it is not party

to and does not accept that agreement, the Carpenters side with Chalmers in that respect. The Board observed the existence of this agreement but paid little attention to it in *Doug Chalmers Construction Limited, supra*. In this “second look”, the Board finds it appropriate to observe that on its face, and in contrast to the similar agreement the Labourers obtained from Delta Catalytic (see paragraphs 7 and 8, above), the agreement with Chalmers attaches great significance to considerations of costs, efficiency and productivity, to the extent that it is only subject to those considerations that the parties agreed to the “general manner in which scaffolding will be tended, erected and dismantled.” [emphasis added] While it is neither a trade agreement, nor otherwise determinative of anything in this jurisdictional dispute, the structure of this agreement does lend support to Chalmers plea for more discretion, and suggests that greater consideration is appropriately given to the company’s economy and efficiency submissions.

60. In *Doug Chalmers Construction Limited, supra*, (at paragraph 28), the Board concluded that the factor of skill, training and safety favoured the claim of neither trade union. Strictly speaking, that is of course true. But the dispute here is not really about what is properly considered to be construction labourers tending work, but rather where to draw the line between the tending that labourers do and the tending that is part of the carpenters’ erection and dismantling work jurisdiction. In that respect, skill, training and safety favours the existence of such a line. That is, the materials suggest that in addition to “practicalities”, skill, training and safety require that the handling or tending component of the erection and dismantling work performed by Carpenters is properly considered to be a part of that work.

61. In paragraph 39 of the *Doug Chalmers Construction Limited, supra*, decision, the Board commented that “jurisdictional disputes are about work jurisdiction, not about economy and efficiency.” Strictly speaking, that is true, if not trite. However, and notwithstanding that this panel agrees with the statements in paragraphs 40 and 41 of that decision, economy, efficiency and employer preference must be given fair consideration in a jurisdictional dispute proceeding. It may be that in many cases, these factors will neither be determinative nor of any particular assistance, but they have long been considered to be relevant considerations and should not be given short shrift. To say that they are no more than a kind of “tie breaker”, although generally accurate as a matter of jurisprudential history, is nevertheless probably understating their significance. This is particularly true in the more unusual cases, like this one, particularly where the amount of work is also in issue (see, for example, *Boise Cascade Canada Inc.*, [1979] OLRB Rep. Sept. 850, which although not a construction case nevertheless illustrates the point; and in a construction context, see *Tilechem Limited*, Board File No. 1880-88-JD, July 14, 1982, unreported).

62. Our analysis of the work in dispute, and of the other factors or considerations as aforesaid, leads us to conclude that it is appropriate to give economy, efficiency and employer preference greater weight than the Board was prepared to do in *Doug Chalmers Construction Limited, supra*. In that respect, the Board finds the photographs, the video of the Safway systems scaffolding, and the descriptions of how scaffolding work is performed very helpful. The Board has also considered the Labourers’ response in that respect, including its inability to satisfactorily answer the feather bedding concerns, to be significant.

63. In the result, having considered all of the material before the Board, we are satisfied that it is inappropriate to require a minimum of one or any other number of construction labourers to be assigned to tend carpenters on every scaffold. However, while as a general matter, the Board does not get particularly specific about the numbers of employees who must be assigned to do disputed work, even when the Board considers a composite crew to be the answer, there is no reason why the Board cannot do so in the appropriate case. This is one of those (probably rare) cases in which it is not only appropriate but necessary to do so.

64. The Board is satisfied that the approach which the Board took in *Tilechem Limited, supra*, is applicable to this dispute. The work in dispute in that case was the erection and dismantling of masonry scaffolding. The work was assigned to “mason tenders” who were members of the Labourers’ union. The Carpenters disputed the assignment. In upholding the employer’s assignment, the Board in that case made the following pertinent comments:

19. The final criteria the Board looks to involves considerations of economy and efficiency. The erection of scaffolding on this type of project is intermittent, and there is not enough work to keep even one person busy. To assign the work to the carpenters would mean that for much of the time a carpenter would have to be specifically called in for relatively brief periods of time to do the work, perhaps for three days every two weeks. In the alternative, a carpenter would have to be permanently employed to do the work. In such a situation, the carpenter would either spend most of his time with nothing to do, or he could keep busy by primarily working as a mason tender.

20. It is true that more trades than just masons and mason tenders work off the scaffolding. However, the fact remains that the construction of unit masonry acid resistant tanks and vessels primarily involves masonry work. Carpenters and ironworkers are normally on a project for only relatively brief periods of time. Further, because the walls of the tanks must go up fairly slowly, the use of a full-time scaffolding crew, such as is done on other types of construction, would make very little sense.

21. Given all of the above, we are satisfied that it is more appropriate that the work in dispute be assigned to mason tenders belonging to the Labourers’ union rather than to carpenters. ...

This is an appropriate approach to take to the factor of economy and efficiency and the manner in which Chalmers organizing its scaffolding work (see *Premier Pipelines Limited*, [1988] OLRB Rep. Oct. 1068).

65. Accordingly, as a general matter, a labourer is not required to tend a crew of two or three carpenters which is erecting or dismantling a scaffold. A labourer will be required to tend carpenters only where there is sufficient general (i.e. labourers) tending work available to fully occupy a labourer for a minimum of four hours during a single shift (i.e. the equivalent of a labourer working day).

66. To borrow from the example presented in Chalmers’ materials and developed at the consultation, assume a stock pile, a materials inspection and fabrication point some distance from the stock pile, and a point of erection a further distance away from the inspection fabrication point. Two or three carpenters are assigned to erect a single simple systems scaffold in an unobstructed petro-chemical plant environment. The handling and movement of the scaffolding material to the inspection/fabrication point is general tending work, inspection/fabrication work is part of the erection work assigned to carpenters, the movement of the material from the inspection/fabrication point to the point of erection is general tending work, and all work at the point of erection, including the tying on and hoisting of materials is part of the erection work assignment to carpenters. If the total of the general tending work in this process (i.e. both movements - from the stock pile to the inspection/fabrication point, and from that point to the erection point) would reasonably occupy a worker for a minimum of four hours a day, that tending work must be assigned to a construction labourer. If not, it need not be.

67. Assuming the same scenario, but adding another scaffold and another two or three carpenters, the work assignment requirements are the same. If there is any movement of scaffolding material between the two scaffolds (i.e. “jobs”) that is general tending work which is added into the equation to determine whether the total amount of general tending amounts to a minimum of four hours of work.

IV Decision, Part 3 - The Result

68. It is apparent that the amount of general tending work which will be available is not necessarily proportional to either the number of scaffolds, the number of carpenters engaged in erection

or dismantling work, or the amount of erection or dismantling work which is required. However, it is nevertheless possible to construct a general formula for approaching the assignment of tending work associated with the erection and dismantling of scaffolding (i.e. the work in dispute) as follows:

- (a) General tending, as defined in this decision, is *prima facie* in the work jurisdiction of the construction labourer.
- (b) All other tending work is within the work jurisdiction of the carpenter.
- (c) General tending work is to be assigned to one or more construction labourers, unless there is insufficient general tending work required to keep a construction labourer occupied for a minimum of four hours during a working day, in which case it may be assigned as Chalmers in its discretion considers appropriate.
- (d) An additional construction labourer must be assigned to perform general tending work when there is sufficient such work to keep the first labourer fully occupied for a full working day and there is additional work to fully occupy another labourer for an additional four hours. If there is less than four hours more than a full day's general tending work, that additional increment may be assigned as Chalmers in its discretion considers appropriate.
- (e) An additional construction labourer must be added as necessary in accordance with this formula; that is, every time the amount of general tending work to be performed exceeds any multiple of one full day of such work by a minimum of four hours.
- (f) Chalmers is always free to assign additional construction labourers to perform general tending work as it considers appropriate. That is, the fact that the amount of general tending work available is less than four hours worth of work does not mean that that work is within the Carpenters' work jurisdiction.

69. The Board therefore orders Doug Chalmers Construction Limited to assign construction labourers to tend carpenters engaged in the erection or dismantling of scaffolding in accordance with this decision, and specifically the formula as aforesaid.

70. Given the unusual nature of this case, the Board will also take the further unusual step of remaining seized with this matter for the purposes of dealing with any difficulties arising out of the interpretation or implementation of the decision or the Board's order for a period of six months.

4821-97-JD Labourers' International Union of North America, Local 837, Applicant v. **Dufferin Construction Co.** and United Brotherhood of Carpenters and Joiners of America, Local 18, Responding Parties

Construction Industry - Jurisdictional Dispute - Sector Determination - Labourers' union and Carpenters' union disputing assignment of work in connection with concrete for base slab and containment walls built in connection with salvage and replacement of high concentration glycol storage tanks - Carpenters' union bargaining rights with employer restricted to ICI

sector of construction industry - Board concluding that disputed work falling outside ICI sector and accordingly that work properly assigned to members of Labourers

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *J. G. Knight* and *G. McMenemy*.

APPEARANCES: *A. M. Minsky* and *M. Bastos* for the applicant; *Joseph Liberman* and *Jake Sudac* for Dufferin Construction Co.; *David McKee* and *Bob Yakiwchuk* for United Brotherhood of Carpenters and Joiners of America, Local 18.

DECISION OF THE BOARD; August 11, 1998

1. This is a complaint filed under section 99 of the *Labour Relations Act, 1995* (the "Act") in which the Labourers' International Union of North America, Local 837 (the "Labourers") requests the Board to make a direction with respect to work described as:

the concrete formwork (ie. all work associated with the on-site fabrication, installation, stripping and dismantling of forms to receive concrete) for the base slab and containment walls built in connection with the salvage and replacement of two high concentration glycol storage tanks.

2. The parties are in dispute as to which sector of the construction industry the work in dispute is in but are agreed that, if the work falls in a non-ICI sector of the construction industry, such would be determinative as the United Brotherhood of Carpenters and Joiners of America, Local 18 (the "Carpenters") does not claim any work performed outside of the ICI sector by employees of Dufferin Construction Co. ("Dufferin") as it has no bargaining rights with respect to such sectors. It is the Board's determination, for reasons set out below, that all of the work in dispute is outside of the ICI sector such that the work was properly assigned by Dufferin to members of the Labourers.

3. The work in dispute involved replacing an existing glycol recovery system at the Hamilton International Airport. The parties are agreed that the following description of how the improved system would operate is accurate:

The improved system will function as follows. Airplanes requiring de-icing proceed to the designated area where a tanker truck sprays it with glycol. The glycol will either be sucked up by a vacuum truck or travel across the apron into the catch basins and the storm sewer system. The glycol proceeds through the sewers to the sampling chamber, where the concentration of glycol in the sewage can be determined. If the concentration of glycol is greater than three per cent (3%), the glycol may be pumped out of the sample chamber to the tanks for storage for recycling, if possible. If the concentration is within acceptable levels, it may then be discharged, either directly into the sewer system or into the holding pond for later discharge into the sewer system.

4. Very little is known about how the glycol is ultimately removed from the tank. Once removed from the tank the glycol is transported to another location, presumably by truck, for processing. No processing takes place in the tank or at any processing facility to which the tank is attached. The tank merely holds the glycol for recycling purposes.

5. Dufferin's contract involved the demolition and expansion of large sections of the runways, aprons and taxi ways, the installation of new 36 inch sewers lines, catch basins, man holes and the sampling chamber, as well as the excavation for the holding pond. The work in dispute comprised less than two percent of work performed by Dufferin. It is not disputed that the other 98 percent of the work performed by Dufferin is work falling within one of the civil sectors such as roads or sewers and watermain. It is estimated that 75 per cent of the work was roads work and the remainder was sewers and watermain construction. The work in dispute is valued at approximately \$24,000. Dufferin's contract was for \$1.2 million.

6. The parties are in dispute as to how to describe the function performed by the storage tanks for which the base slab and containment walls were built. The dispute arises as a result of the Board's decisions in *Matthews Contracting Inc.*, [1993] OLRB Rep. Dec. 1332, affd. (Ont. Div Ct.) [1995] OLRB Rep. March 391 and *Duntri Construction Ltd.*, [1996] OLRB Rep. June 399.

7. In *Matthews Contracting Inc.* the Board found the construction of an underground concrete water storage tank to be work in the ICI sector of the construction industry. The tank in question was connected to a pumping station which pumped the dirty water to a water treatment plant located four to five miles away. In addition to a holding function, the tank performed a settling function and contained a device which permitted the sludge which settled to the bottom of the tank to be flushed. The Board concluded that the tank was an adjunct to a system of treating sewage and water which was viewed as an industrial process and thus work in the ICI sector of the construction industry.

8. In *Duntri Construction Ltd.* the Board determined that the construction of a raw sewage pumping station fell within the sewer and watermain and not the ICI sector of the construction industry. The Board determined that the pumping station did not treat or process the sewage in any fashion, it merely moved it along from its point of origin to its point of destination. In the Board's view, it was no more an adjunct of the treatment process than the sewer pipes which carry the sewage. The Board distinguished the tank at issue in *Matthews Contracting Inc.* on the basis that it affected the material stored and could, as a result, be said to be part of the "processing" of the material.

9. In our view, the tank at issue in the present case is one step further removed from the processing function than was the pumping station in *Duntri Construction Ltd.* In the present case, not only does the tank have no affect on the material stored within it, the tank is not connected in any way to the facility where the processing takes place. The glycol has to be removed from the tank and transported to the processing facility by truck. In our view, this factor makes the tank at issue in the present case more remote from the processing function than was the pumping station at issue in *Duntri Construction Ltd.* and accordingly, in our view, the work performed in connection with the glycol holding tank is within the sewer and watermain sector and not the ICI sector of the construction industry.

10. As a result, the assignment of the work in dispute to the Labourers is upheld.

1201-96-JD Millwright District Council of Ontario on its own behalf and on behalf of its Local 1151, Applicant v. **EKT 90 Inc.**; Iron Workers District Council of Ontario; International Association of Bridge, Structural and Ornamental Iron Workers, Local 759, Responding Parties

Construction Industry - Jurisdictional Dispute - Millwrights' union and Ironworkers' union disputing assignment of certain work described as removal and rigging of worn chain clips, pins and chains, and the rigging, installation and welding of new chain clips, pins and chains at paper mill lime kiln in Board Area 22 - Board holding that work was properly assigned to 50-50 composite crew of ironworkers and millwrights - Employer directed to assign this work on 50-50 composite crew basis in Board Areas 22, 23, 24 and 25

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

APPEARANCES: Pierre Sadik and Gord Milliard for the applicant; Fred Bickford and Denis Magne for EKT 90 Inc; Gary Caroline and Robert Stoppel for Iron Workers, Local 759.

DECISION OF THE BOARD; August 21, 1998

1. This is an application concerning a work assignment filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995* (the "Act").
2. The parties filed briefs supporting their claims. A consultation was held to hear the parties' representations. On agreement of the parties representations were completed in writing following the consultation.
3. The parties agreed to describe the work in dispute as follows:

"the removal and rigging of worn chain clips, pins and chains, and the rigging, installation and welding of new chain clips, pins and chains at the James River Paper Mill lime kiln in Marathon, Ontario".
4. EKT 90 Inc. ("EKT") is bound to the Ironworkers and Millwrights ICI collective agreements. EKT assigned the work on a 50/50 basis to members of the Ironworkers Local 759 and members of the Millwrights Local 1151 in accordance with its understanding of the trade agreement for Rotary Kilns and Related Equipment. This is EKT's first kiln chain project. The Ironworkers are claiming all of the disputed work. The Millwrights do not claim exclusive jurisdiction over this work.
5. The work in dispute took place over a period of 5 days using 2 ironworkers and 2 millwrights. The jobsite is located in Board Area 22. The geographic jurisdiction of both union locals covers Board Areas 22, 23, 24 and 25. The parties agreed the Board's decision would apply to these four Board Areas.
6. It is the Millwrights' position that the disputed work was part of EKT's shut-down contract at the mill. Both trades were on site throughout the shut-down. Where both trades are on site, the Millwrights assert the area practice has been to assign the work in dispute on the basis of a composite crew.
7. The Ironworkers assert section 4 of the trade agreement's reference to "installation of chain and attachments" refers to *drive chains* not the *non-mechanical* chains inside the lime kilns. At the time of the trade union agreement in 1968 kilns' were chain-driven as opposed to operated by gear-driven motors used now.
8. In the alternative, the Ironworkers assert the 50/50 composite crew trade agreement only applies to the *installation* of the chains, not their maintenance, repair or replacement; the area practice assigning maintenance repair, and replacement of kiln chains is exclusively to iron workers.
9. The Millwrights submit as the Ironworkers assert the assignment was improper, they bear the onus to persuade the Board the EKT assignment should be interfered with. (see *Ecodyne Limited*, [1997] OLRB Rep. March/April 197 at para. 13).

At the consultation, there was some dispute concerning who bears the onus in this complaint. Jurisdictional disputes are atypical proceedings, particularly where the consultation process is invoked, as it almost always is. A jurisdictional dispute complaint is not always brought by the party which asserts that the work assignment is incorrect. Many such complaints, like this one, are brought by either the employer, or by the trade union which obtained the work, generally in response to a grievance or the threat of one from a trade union which asserts that the work in dispute should have been assigned to its members, in either case with a view to obtaining a confirmatory decision from the Board. The fact is that the determination of most jurisdictional disputes complaints will not depend on who bears the onus, but a fair reading of the Board's jurisprudence is that the party which asserts that a work assignment was improper bears the onus of persuading the Board that the work assignment should be interfered with, whether it is the complainant or a responding

party in the actual jurisdictional dispute complaint proceeding. This is as it should be, and is consistent with the traditional legal notion that the party which asserts a wrong must establish it.

10. The Millwrights assert the area practice with respect to chains supports their claim of a 50/50 composite crew. Some of the materials filed by the Ironworkers do not refer to "chains" specifically.

11. The trade agreement for Kilns provides:

Section 4. Kilns

Trunnions will be power rigged over anchor bolts by Iron Workers, Millwrights and align, level and secure. Shell of kiln will be rigged, assembled and welded by Iron Workers.

Iron Workers will power rig tires, bull gear and drive. Millwrights will completely assemble and weld same, including pads and keeper rings, align, level and secure drive. Final alignment of kiln will be done by Millwrights. Chain, including attachments, will be installed by a 50-50 composite crew.

12. The work in dispute was performed during a shut-down. For the purpose of making this determination it is assumed this is construction work as defined by the Act. The Board further finds it is appropriate in these circumstances to make its declaration with respect to the geographic jurisdiction of both union locals, Board Areas 22, 23, 24 and 25.

13. It is not necessary for this determination to make a finding with respect to the meaning of the 1968 trade agreement for kilns. EKT made the assignment of the work based on its understanding of section 4 of the trade agreement. The area practice in Board Areas 22, 23, 24 and 25 by contractors signatory to both collective agreements is mixed. This mixed area practice appears to be evenly divided between utilizing a 50-50 composite crew of millwrights and ironworkers and assigning the disputed work exclusively to ironworkers. On some projects the disputed work was assigned exclusively to Millwrights.

14. The factors of skill and ability are neutral. Both trades are able to perform this work. Economy and efficiency does not favour either trade.

15. As this is the first time EKT has performed this type of work there is no relevant past employer practice. The employer's preference however is to assign the work to a 50-50 composite crew.

16. It appears that in the past both unions have accommodated owner/client requests to the contractors to use the trades on site rather than bringing in additional ironworkers (or millwrights as the case may be) to do the work. For example the work done by Link Steel at Avenor in Dryden was assigned to the millwrights at the request of the customer because millwrights were already on site.

17. Having regard to the materials filed and the submissions of the parties, the Board is satisfied the work in dispute was properly assigned by EKT to a 50-50 composite crew of ironworkers and millwrights.

18. EKT is directed to assign this work on a 50-50 composite crew basis in Board Areas 22, 23, 24 and 25, the geographic jurisdiction of Ironworkers Local No. 759 and Millwrights Local No. 1151.

0530-98-G Masonry Council of Unions, Toronto & Vicinity and Bricklayers Masons Independent Union of Canada, Local 1 and Labourers' International Union of North America, Local 183, Applicants v. **Gottardo Masonry & Contracting Ltd.**, Responding Party

Construction Industry - Construction Industry Grievance - Timeliness - Union grieving lay off and failure to recall three employees and alleging that employer acting arbitrarily - Collective agreement making reference to lay-off in management rights clause, but none at all to recall - Union filing grievance after expiry of time limit set out in collective agreement - Board finding grievance untimely but that employer waived its right to object by taking steps to settle without ever raising any objection or reserving right to do so in future - Board finding that union's grievance regarding lay-off making out prima facie case, but that there is no prima facie case regarding failure to recall

BEFORE: Gail Misra, Vice-Chair, and Board Members G. Pickell and G. McMenemy.

APPEARANCES: Mark Lewis for Masonry Council of Unions, Toronto & Vicinity and Bricklayers Masons Independent Union of Canada, Local 1; Mark J. Lewis, Nicholas Keresztesi and Mario Moschella for Labourers', Local 183; Brett Christen, Denise Bolohan and Ron Gottardo for the responding party.

DECISION OF THE BOARD; July 2, 1998

1. This is a referral to arbitration of a construction industry grievance pursuant to section 133 of the *Labour Relations Act, 1995* (the "Act").
2. The applicant (the "union") grieves that the responding party (the "employer" or "Gottardo") improperly laid off three employees and failed to recall them to employment at a job site at Kennedy Road and Ellesmere Avenue in Scarborough, Ontario. The employer made a preliminary objection that the grievance is untimely, and therefore inarbitrable. Further, the employer maintains that since the collective agreement does not provide a right of recall for laid off employees, that the grievance does not disclose a *prima facie* case for a violation of the collective agreement. The parties made submissions on these threshold issues on the first day of hearing.
3. The grievors, David Aguiar, Mario Aguiar, and Emanuel Aguiar ("David", "Mario", and "Emanuel", or the "Aguiars") along with Antonio Aguiar, were employed by Gottardo as a bricklaying crew on a residential low-rise project at Kennedy Road and Ellesmere Avenue in the week of March 18, 1998. On March 18, 1998 a scaffolding accident occurred on the job site which resulted in Antonio Aguiar (the father of David and brother of Mario and Emanuel) sustaining some injuries and having to be taken to a hospital. The Ministry of Labour issued a stop work order as a result of the accident, and the employer was directed to make some repairs. When the job site was closed it would appear that all employees including the three grievors, David, Mario and Emanuel Aguiar, were sent home.
4. The union alleges that on the day following the accident Mr. Ron Gottardo, the principal for the employer, called David Aguiar. When Mr. Gottardo was asked when the Aguiars could return to work he is alleged to have indicated it would take two or three days to make necessary repairs, and then the Aguiars would be able to return to work. The union alleges that David called Mr. Gottardo a number of times after that to see when the Aguiars could return to work, but was told that it would be in a few days. None of them was ever allegedly recalled. On March 31, 1998 David received a Record of

Employment which indicated he had been laid off due to a lack of work. Neither of the other two grievors ever received a Record of Employment.

5. The employer claims Mr. Gottardo called David on the evening of March 18 and at that time asked him to return to work the next day. However, according to the employer, David indicated he would not come to work the next day and that he was taking his father to the hospital. The employer position is therefore that it did ask David to return to work, but he refused. It would appear that on March 20 Emanuel called Mr. Gottardo to ask why bricklayers were working at another job site when he had not been called back to work. In the course of that conversation it is alleged that Mr. Gottardo told Emanuel that the job site was still closed and he could not therefore call Emanuel back yet. On March 21 Mr. Gottardo allegedly spoke to Mario and in the course of that conversation told Mario that he could return to work on March 23, and that he would be recalling David and Emanuel too at some point. The employer claims that Mario refused to come back to work unless all the Aguiars could work together, which Mr. Gottardo would not allow.

6. It appears that David approached the union on March 31 as soon as he received his Record of Employment. A union staff person prepared a grievance which was reviewed by Mr. Lewis, counsel for the union, on April 7. As the grievance as drafted was not entirely accurate, Mr. Lewis instructed Mr. Keresztesi, also counsel for the union, to inquire into the matter. Mr. Keresztesi met with David Aguiar on April 15 and then dictated a draft grievance. Somewhat inexplicably the grievance was not typed up until May 7, although the Board was informed that all of the union's legal department software was being changed and that that caused the computers to cease functioning at some point during this period. The grievance was both delivered to the employer on May 7, and this referral to arbitration was made to the Board on the same date. The union concedes that the grievance was filed late. There is no evidence that the union asked the employer for an extension of the time limits. By a letter dated May 8, Mr. Gottardo informed the union that the three grievors had been contacted several times after March 18 to return to work, but had refused to do so. He indicated he had discussed these refusals with Mr. John Meiorin, of the union and suggested that a meeting should be set up with the employer, union, and the grievors present.

7. The Board scheduled a hearing to be held in this application on May 21, 1998, with a terminal date for the filing of a response on May 20, the day before the hearing was to commence. No response was filed, but the parties agreed to adjourn the hearing to May 29, and to meet to discuss the matter in dispute on May 27. The May 27 meeting never took place as prior to that date counsel for the two parties had a discussion by telephone and ascertained that there was no point in meeting as it did not seem likely that a settlement could be achieved. The response was filed on May 28, and in it the employer took the position that the grievance was untimely. The union alleges it was not until this juncture that the employer raised this issue, even though Gottardo had been dealing with the merits of the grievance up to this point. The union therefore argues that the employer waived the time limits by its conduct. The Board, for reasons unrelated to the parties, adjourned the May 29 hearing date, and this matter was first heard on June 11, 1998.

8. The collective agreement governing the relationship between these two parties, and under which this grievance has been filed, is between the Masonry Contractors' Association of Toronto and the Bricklayers, Masons Independent Union of Canada, Local 1, the Labourers' International Union of North America, Local 183, and the Masonry Council of Unions Toronto and Vicinity, and is effective from April 16, 1996 to April 30, 1998. The parties agree that this is the collective agreement to be applied in this case. Article 4 of the agreement addresses the grievance procedure. The relevant sections are as follows:

4.01 The parties to this Agreement are agreed that it is of the utmost importance to adjust complaints and grievances as quickly as possible.

4.02 Grievances properly arising under this Agreement shall be adjusted and settled as follows:

Step No. 1

Within ten (10) working days after the circumstances giving rise to the grievance occurred or originated, the aggrieved employee with his business representative may present his grievance, which shall be reduced to writing, to the Employer. Should no settlement satisfactory to the employee be reached within five (5) full working days, and if this grievance is one which concerns the interpretation or alleged violation of the Agreement, the grievance may be submitted to arbitration as provided in Article 5 below any time within ten (10) working days thereafter but not later.

• • •

4.05 In determining the time which is allowed, Sundays and Statutory Holidays shall be excluded; however, any time limit may be extended by agreement in writing.

4.06 In the event the Union does not pursue a grievance in a reasonable manner or time, such grievance shall be deemed abandoned.

9. Article 5 of the collective agreement addresses the arbitration process and the relevant sections state:

5.01 The parties to this Agreement agree that any grievance concerning the interpretation or alleged violation of this Agreement which has been properly carried through all steps of the grievance procedure outlined in Article 4 above and which has not been settled, will be referred to a Board of Arbitration at the request of either of the parties thereto and in accordance with the *Ontario Labour Relations Act*, particularly Section 126 [now 133] thereof.

• • •

5.06 The Board of Arbitration shall not have any power to alter or change any of the provisions of this Agreement or to substitute any new provisions for any existing provisions nor to give any decision inconsistent with the terms and provisions of this Agreement.

• • •

5.08 • • •

(b) If advantage of the provisions of Article 4 and 5 is not taken within the time limits specified therein or as extended in writing, as set out above, the grievance shall be deemed to have been abandoned and may not be re-opened.

10. The employer argues that the time limit began to run from March 18, 1998, when the accident occurred and the job site was shut down. The Board cannot accept this proposition. At that juncture, and assuming that the union can make out its claim that the Aguiars were told a few days after March 18 that they would be called back to work, there would have been no cause for concern on the part of the grievors. In addition, at that time all employees working on the particular job site had been told that they could not work. In our view it is on March 31, 1998, when David received a Record of Employment, that the potential problem crystallized: At that point David knew with certainty that he was not going to be recalled, and it is likely that the other two grievors would have surmised that they too would not be called back. Therefore, the Board accepts the union's view that the time for filing a grievance began on March 31, 1998.

11. A grievance should then have been filed within 10 working days of that date, not counting Sundays and statutory holidays (see Article 4.05). Since Good Friday was on April 10, the deadline for the filing of the grievance would have been on April 13, 1998. While a grievance had been prepared after David complained to the union about his layoff, that grievance was found to be incomplete by Mr.

Lewis on April 7. However, Mr. Keresztesi did not meet with David Aguiar until April 15 to refine the grievance, which was subsequently dictated but not typed up until May 7. Thus the April 13 deadline was missed before Mr. Keresztesi had met with David, and before the second draft grievance became mired in the union's computer problems. The Board has heard no explanation for the lapse of time between April 7 and 13.

DECISION

12. The first issue to be addressed is whether the grievance is untimely, and therefore must be deemed to have been abandoned. A review of the language of the collective agreement, as outlined above, indicates that the parties to the agreement intended that complaints and grievances be addressed as quickly as possible (see Article 4.01). To this end the language agreed to by the parties in Article 4 regarding the "Grievance Procedure" suggests that there was agreement as to how grievances about particular issues would be dealt with. Thus, complaints regarding payment for hours or work, rates of pay, overtime, premiums, travelling expenses, room and board allowances, and reporting allowances may be grieved within two months of the circumstances arising. Issues regarding the payment of pension contributions, welfare contributions, industry fund contributions and union dues may be grieved within 45 days after the circumstances became known, or ought reasonably to have become known to the union (see Article 4.03). All other matters appear to be addressed in the time limits set out in Article 4.02, which states that an aggrieved employee may present his/her grievance in writing within 10 working days of the circumstances giving rise to the grievance having occurred.

13. The matter in dispute in this case falls under Article 4.02. The Board has found that the issue crystallized on March 31, 1998, and that the 10 day time limit therefore expired on April 13, 1998. Although the collective agreement anticipates that a time limit may be extended if the parties agree in writing, that agreement was neither sought nor obtained in this case.

14. The parties agreed that if the provisions of Articles 4 or 5 are not engaged *within the time limits specified therein or as extended in writing*, the grievance shall be deemed to have been abandoned and may not be re-opened (see Article 5.08(b)). The parties clearly turned their collective minds to what the consequences of not meeting time limits would be. This is not surprising since they were *ad idem* that it is of the "utmost importance" to resolve complaints and grievances as quickly as possible.

15. In *Centro Masonry Limited* (Unreported, Board File Nos. 2656-96-R and 2657-96-G, July 8, 1997) the Board considered the issue of timeliness in the filing of a grievance under the same collective agreement as is before this panel. While in that case the Board was considering an issue with respect to Article 4.04, it had occasion to also consider the meaning of Article 5.08(b). At paragraph 21 of the decision the Board stated:

... Article 5.08(b) states that if grievances are not processed in accordance with the time limits specified in articles 4 and 5, then they "shall be deemed to have been abandoned and may not be reopened." It is certainly the case that the use of "may" relied upon by the applicant in article 4.04 is ambiguous in the context of that article. What is clear however is that the parties through the use of the term "shall" in article 5.08(b), intended that grievances which were not processed in a timely fashion were to be deemed to be abandoned and not re-opened. The clarity in the following article qualifies the ambiguity in the preceding one. If the applicant's interpretation of article 4.04 were correct, article 5.08(b) could not be read with it and there would be a clear conflict between the two provisions. Where possible, the collective agreement should be read in a manner which provides for internal consistency.

16. The Board in *Centro* also addressed whether section 133(2) of the Act permits the Board to accept a referral of a grievance to arbitration at any time. This panel agrees with the Board's statement at paragraph 33 of that decision:

In my view, the correct interpretation of section 133(2) is to permit the Board to accept a referral at any time while the matter constitutes a “grievance” as defined by the collective agreement. This is consistent with the language of section 133(1) which uses the category “grievance”, to describe the thing which is referred under that section. While the matter is still considered “alive” for purposes of the collective agreement, it can be brought to the Board without exhausting the grievance procedure. This is why the process is considered to be an expedited one. Once the matter however is deemed to be abandoned, it no longer exists as a “grievance”. At this point, according to the agreement there is nothing left to be referred “at any time”. Without an extant “grievance”, the Board has nothing with which to proceed.

17. The Board finds that the language of the collective agreement suggests a penalty if the time limits for the filing of grievances are not adhered to. The parties, in Article 5.06 of the agreement, state that a board of arbitration shall not have any power to give any decision inconsistent with the terms and provisions of the agreement. In the circumstances of this case it would appear that the union simply missed the deadline for the filing of a grievance. In the construction industry time is of the essence as the duration of any job can be quite short. It has therefore been considered important to resolve any construction workplace issues as quickly as possible to properly preserve the rights of all parties to a dispute. This is the reason why the Act allows a party to a grievance in the construction industry to file an application for arbitration and to get a hearing 14 days from the date of application. The parties to the collective agreement presently before the Board appear to have been particularly concerned that disputes be identified and dealt with quickly.

18. We are further bolstered in our view that the parties had intended that the time limits agreed to would be of some significance because they agreed to different time limits for various types of grievances. It would appear that all matters not included in the specified time frames are subject to the ten day time period. The Board is of the view that the language of the collective agreement on the issue of time limits is mandatory, and not directory. This is particularly so when the various sections of Articles 4 and 5 are read as a cohesive package: These parties articulated their goal of dealing with complaints and grievances as quickly as possible; they then state the time limits for the filing of various types of grievances; they define what is included in the count of days, and specifically and somewhat unusually, include Saturdays in the days to be counted; and then, at Article 4.06, state that if the union does not pursue a grievance in a reasonably timely matter, a grievance *shall* be deemed abandoned. Finally, and in case any of the other provisions were not clear enough, these parties agreed that if advantage was not taken of Articles 4 or 5 within the time limits (or as extended in writing), the grievance *shall be deemed to have been abandoned and may not be re-opened*.

19. Unless the Board finds that the employer has waived the time limits, or exercises its discretion under section 48(16) of the Act to relieve against the time limits in the agreement, the referral to arbitration will be untimely. Section 48(16) states:

48. (16) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

20. As noted earlier, the union argues that the responding party has waived its right to raise the timeliness of this grievance. In *Centro*, cited earlier, the Board addressed the same argument. As the Board noted in that case, the time limits in a collective agreement are procedural matters which may be waived. Waiver of procedural rights will occur when the responding party takes a “fresh step” without either raising the issue of timeliness or reserving its right to rely on it at a later time (see *Re Port Colborne General Hospital and Ontario Nurses Association*, (1986) 23 L.A.C. (3d) 323). Whether or not there has been a waiver of rights is a question of fact, and the party who asserts the waiver bears the onus of proof.

21. In this case the employer wrote to the union the day after receiving the grievance and indicated its side of the dispute. Further, the employer suggested that the parties meet to discuss the grievance. No mention was made of the apparent untimeliness of the grievance. Thereafter the parties engaged with each other a number of times to adjourn Board and meeting dates, and counsel for both sides discussed the possibility of reaching a settlement. During all of those interactions the responding party never told the union it was objecting to the grievance on the basis of timeliness. It was only around the time when the response was filed that the union was made aware of the employer's objection on the basis of timeliness.

22. The employer did not object to the union's characterization of the sequence of events as they have been outlined in this decision. Although it is clear that the employer corresponded with the union and the parties discussed the grievance after it was filed and referred to arbitration, there is nothing to suggest that prior to May 27, 1998 the employer ever indicated to the union that it was preserving its right to object to the grievance on the basis of it being untimely, or was in fact objecting to the grievance on that basis. In these circumstances, it would appear to the Board that the employer waived its right to object to the grievance on the basis of timeliness.

23. Having found that the responding party waived its rights regarding timeliness, it is unnecessary for the Board to address the issue of the exercise of the Board's discretion pursuant to section 48(16).

24. We now turn to the employer's second objection. It is argued that the union has not made out a *prima facie* case for a violation of the collective agreement. The union concedes that there are no provisions in the collective agreement regarding seniority or a right to be recalled to employment.

25. The Management Rights clause of the collective agreement states as follows:

3.01 The Union agrees and acknowledges that it is the exclusive function of the Employer to manage his enterprises and without limiting the generality of the foregoing:

- (a) to conduct and determine the nature of his business in all respects, including the right to manage the jobs, locate, extend, curtail or cease operations, to determine the number of men required at any or all operations, to assign work, to determine the kinds and location of machinery, tools and equipment to be used and the schedules of production, to judge the qualifications of the employees and to maintain order, discipline and efficiency;
- (b) to hire, discharge, classify, transfer, promote, demote, lay off, suspend or otherwise discipline employees, provided that a claim by an employee that he has been disciplined or discharged without reasonable cause, shall be subject to the provisions of the grievance procedure;
- (c) to make, alter from time to time and enforce reasonable rules of conduct and procedure to be observed by the employees.

It is agreed that these functions shall be exercised in a manner inconsistent with the express provisions of this Agreement.

26. As is clear from the management rights clause, while there is a reference made to "lay off", there is no reference made to recall. There is therefore nothing in the collective agreement regarding the recall of construction employees to employment. The Board therefore agrees with the responding party that the union has failed to make out a *prima facie* case for a violation of the collective agreement with respect to the recall of the grievors to employment at Gottardo.

27. As lay off is referenced in the management rights clause as one of the exclusive functions of the employer in the management of the enterprise, the union argues that when an employer seeks to exercise its lay off right, it must do so in a reasonable manner, and cannot do so arbitrarily, discriminatorily or in bad faith. The basis of the union's grievance with respect to the lay off of the three grievors is that they were laid off arbitrarily, or in a discriminatory or bad faith manner following the accident at the job site.

28. The employer responds that the grievance did not suggest that this was a ground that the union was relying upon.

29. In *Keele Carpentry Ltd.*, (Unreported, Board File No. 0981-95-G, November 8, 1995), the Board considered the issue of whether an employer is obliged to exercise some or all of its management rights in a fair and reasonable manner. The Board stated:

(a) Duty to Act Reasonably

19. There is no provision contained in the collective agreement which mandates the employer to act reasonably when exercising all of the rights of management which are reserved to it (though the exercise of certain rights are circumscribed by such an express requirement). The arbitral jurisprudence has, until recently, been contradictory, and it was unclear whether an obligation to act fairly, reasonably, and in good faith is implicitly required of an employer in the exercise of management's rights contained in the collective agreement (contrast, for example, *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.*, (1981), 124 D.L.R. (3d) 684 with *The Council of Printing Industries of Canada and Toronto Printing, Pressman & Assistants' Union No. 10 et al.* (1983), 149 D.L.R. (3d) 53, both decisions of the Ontario Court of Appeal).

20. The most recent Ontario Court of Appeal decision addressing this issue has clarified the law, and concludes that an obligation to exercise management's rights in a reasonable manner is implicit in a collective agreement in circumstances such as those before the Board. In *Re Municipality of Metropolitan Toronto v. CUPE, Local 43* (1990), 69 D.L.R. (4th) 268 (hereinafter "*Metropolitan Toronto*"), a board of arbitration had issued an award in which it determined that a unilaterally-implemented rule requiring ambulance attendants to use warning lights and sirens in certain circumstances was not founded on a valid employer interest and ruled that any discipline based on the rule would be unjust. The Divisional Court determined that the decision of the board of arbitration was patently unreasonable, and quashed the award. On appeal to the Ontario Court of Appeal, the appeal was allowed.

21. The Court of Appeal dealt with a number of issues, including whether an implicit obligation to exercise management's rights reasonably could be read into the collective agreement. In that case, the collective agreement had, in addition to a broadly-worded management's rights clause, a provision which stated that the employer "agrees that it will not exercise any of [the rights reserved to management] in a manner inconsistent with the provisions of this Agreement". As a result of that provision, the board of arbitration concluded that management could not issue rules which undermined the "reasonable cause" protection contained in the management's rights clause, as to do so "would be to invite subversion of the reasonable cause clause".

22. The Court of Appeal approved the approach taken by the board of arbitration, and, in fact, went beyond the approach to suggest that an "overall notion of reasonableness" is implicit in the exercise of management's rights notwithstanding the wording of the particular collective agreement. In reference to the particular facts before it, the Court of Appeal noted as follows (at p. 286 D.L.R.):

... The arbitrator's use of art. 3.02 and of the "reasonable cause for discipline" provision in art. 3.01(ii) is of a similar character. In neither of these cases was the provision relied on *entirely* explicit. However, it does not seem patently unreasonable to view the collective agreement in a holistic manner, where even management rights may be circumscribed in order to avoid negating or unduly limiting the scope of other provisions.

The Court observed that, unlike the previous two Court of Appeal decisions, the one before it involved a rule with “disciplinary consequences”, and it further noted that arbitral jurisprudence had universally established that rules unilaterally promulgated by management are required to be reasonable (see, for example, *Re KVP Co.*, (1965), 16 L.A.C. 73 (Robinson)).

23. Going beyond the case before it, though, the Court of Appeal dealt with the union’s argument that a “notion of reasonable contract administration” ought to be imported into the regime of collective agreement administration. While the Court noted that the authority cited by the trade union in support of that concept was not on point and “difficult to apply” in the collective bargaining context, it made the following observation (at p. 287):

... Like the analogy with respect to standing, it is difficult to apply this case in the context of collective bargaining. Nonetheless, it is true that a collective agreement is an intricate contract, which attempts to reflect the outcome of bargaining on a myriad of issues. It is also true that parties intent on reaching a settlement do not always have the time, the incentive, or the resources to consider the full implications of each and every phrase. *There is, therefore, a place for some creativity, some recourse to arbitral principles, and some overall notion of reasonableness*: see, for example, David Beatty, “The Role of the Arbitrator: A Liberal Version” (1984), 34 U.T.L.J. 136. The presence of an implied principle or term of reasonable contract administration was also acknowledged by Craig J. in *Wardair*, *supra*, at pp. 668-9. (emphasis added)

Ultimately, the Court concluded that the board of arbitration did not interpret the collective agreement in a patently unreasonable manner, and allowed an appeal from the Divisional Court.

30. We are in agreement with the statement of the law as outlined above. It would therefore appear that it is open to the Board to consider the union’s argument in this case. We turn now to address the responding party’s concern that the union had not indicated in its grievance that it would be relying on this argument.

31. In the grievance filed on May 7, 1998 the union indicated to Gottardo that it was alleging a violation of Article 3, the Management Rights clause. While the union did not outline the precise nature of the argument it would be making, the Board is satisfied that the union had advised the employer of what clause it was relying upon in this grievance. There is no requirement that in a grievance a trade union set out in any detail the actual arguments it intends to make. It is sufficient that an employer be made aware of precisely what it is that the union believes is in dispute, what articles of a collective agreement are being relied upon, and the remedies which the union is seeking.

32. To summarize our findings then,

- the Board finds that while the grievance was untimely, the employer waived its right to object to the timeliness of the grievance by taking steps to settle the matter without ever raising any objection or reserving its right to do so in the future;
- the Board finds that there is no *prima facie* case for the union’s grievance regarding recall to employment for the three grievors; and,
- the Board finds that the union has made out a *prima facie* case with respect to the lay off aspect of the grievance.

33. This panel is seized.

0922-98-G Kennedy Masonry Company Limited, Applicant v. Labourers' International Union of North America, Local 183; Bricklayers, Masons Independent Union of Canada, Local 1; Masonry Council of Unions of Toronto and Vicinity, Responding Parties

Arbitration - Construction Industry - Construction Industry Grievance - Board exercising its discretion under Bill 31 amendment to *Labour Relations Act* to refuse to accept employer's referral of union's grievance - Board deferring to expedited arbitration procedures found in parties' collective agreement

BEFORE: *R. O. MacDowell*, Chair, and Board Members *J. G. Knight* and *G. McMenemy*.

APPEARANCES: *Clifford J. Hart* and *Nick Vatalaro* for the applicant; *Mark Lewis*, *Frank D'Abbondanza* and *Janusz Argasinski* for the responding parties; no one appearing for the Masonry Contractors Association of Toronto Inc.

DECISION OF THE BOARD; August 31, 1998

I - Introduction

1. These are the reasons for a decision of the Board dated July 14, 1998, in which the Board refused to accept a referral under section 133 of the *Labour Relations Act, 1995* (as amended).

2. To make this decision easier to read, the applicant will be referred to as "the employer" or "Kennedy", and the various union parties will be referred to, collectively, as "the union". The Masonry Contractors Association of Toronto Inc. will be referred to simply as "MCAT".

3. We should note that this is the *second* application between these parties involving the same issue - namely, whether the Ontario Labour Relations Board should arbitrate a grievance arising under the parties' collective agreement or, alternatively, the Board should defer to the expedited arbitration process provided in that collective agreement. The *first* application ("*Kennedy #1*") canvassing this question resulted in a decision that is now reported at [1998] OLRB Rep. Feb. 50. However, it is important to recognize that the statute has been changed since *Kennedy #1* was decided, so, for completeness, this decision should be read together with the earlier one.

II - How the underlying "grievances" unfolded

4. The referral to arbitration that is now before the Board was made on June 1, 1998, and involves some fairly "run of the mill" allegations that Kennedy has improperly subcontracted the work of the bargaining unit, or has improperly employed individuals who are not union members. These are the kinds of allegations that routinely arise under construction industry collective agreements. There is nothing novel about the subject matter of the underlying grievances, or the way in which the grievances unfolded.

5. The grievances were first brought to Kennedy's attention by letters from the union dated April 23 and May 7, 1998. On May 13, 1998 the parties met in an effort to resolve those grievances, and when the settlement efforts were not successful, the union indicated to Kennedy that it would be referring the matters to "expedited arbitration" in accordance with the provisions of the collective agreement. This has been the union's standard practice since these provisions were added to the agreement (as a result of a strike) a couple of years ago.

6. Kennedy opposed that course of action. Kennedy objected to the “expedited arbitration” process set out in the collective agreement. In Kennedy’s view, the Ontario Labour Relations Board was the proper forum for adjudicating the dispute. Kennedy said that it would immediately refer the grievances to the Board under section 133 of the Act (as it had done in *Kennedy #1*).

7. Following the settlement meeting, the union waited for seven days to see whether Kennedy would refer the grievances to the Board. When no such application was made, the union referred the grievances to expedited arbitration. The next day Kennedy made application to the Board under section 133 of the Act. It is that referral that is currently before us.

III - The statutory framework

8. Section 133 of the Act empowers the Board to act as arbitrator for grievances arising under construction industry collective agreements. Until very recently, section 133 read this way:

133. (1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement between an employer or employers’ organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within 14 days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) *Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48(10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.*

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

(emphasis added)

9. That is the statutory language that was in effect when *Kennedy #1* was decided in February 1998. However, in June 1998, section 133 was amended, and now reads like this:

133. (1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement between an employer or employers’ organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) shall be in writing in the prescribed form and may be made at any time after the written grievance has been delivered to the other party.

(3) A party that refers a grievance under subsection (1) shall, at the same time, give a copy of the referral to the other party.

(4) *The Board may refuse to accept a referral.*

(5) *In deciding whether or not to accept a referral, the Board is not required to hold a hearing and may appoint a labour relations officer to inquire into the referral and report to the Board.*

(6) If the Board accepts the referral, the Board shall appoint a date for and hold a hearing within 14 days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(7) The Board is not required to hold a hearing if the responding party does not file any material.

(8) If the Board does not hold a hearing in the circumstances described in subsection (7), the Board may determine the matter with reference only to the material filed by the party referring the grievance.

(9) If the Board accepts the referral, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48(10 and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(10) The Lieutenant Governor in Council may establish a schedule of fees to be charged to parties in proceedings under this section and, without limiting the generality of what can be included in the schedule, the schedule may provide for the following:

1. Fees payable for referring grievances or participating in proceedings.
2. Fees payable for each hearing day, including hearing days scheduled by the Board but not used.
3. Different fees for the referring party and for the responding parties.
4. A single fee for all the responding parties with the amount to be paid by each responding party to be determined by the Board.

(11) The schedule of fees may also provide for when the fees are due, to whom the fees shall be paid and what the form of payment must be.

(12) A party may participate in a proceeding only if the fees payable by the party are paid in accordance with the schedule of fees.

(13) If an award is made against a party who was given notice of but did not participate in proceedings under this section, the Board may order the party to pay the party in whose favour the award is made, an amount not exceeding the fees paid by the party in whose favour the order is made.

(14) The Board may order a party who participated in proceedings under this section but who was not in a position to participate on a day on which proceedings were scheduled to pay each of the other parties an amount not exceeding the fees paid by that party.

(15) The Board shall not make an order under subsection (14) ordering a party who was not in a position to participate to pay an amount to another party if the other party refused, unreasonably, to consent to an adjournment requested by the party who was not in a position to participate.

(16) Fees payable by a party to the Board shall be paid to the Board for payment into the Consolidated Revenue Fund.

(17) The schedule of fees is not a regulation within the meaning of the *Regulations Act*.

(emphasis added)

10. As will be seen, the former version of section 133 gave the Ontario Labour Relations Board what might be described as a “preemptive” jurisdiction to deal with any grievance arising out of a construction industry collective agreement. The referral to the Board could be made by any party to such agreement (i.e. regardless of who had initiated the grievance), and it did not matter that the collective agreement contained its own arbitration procedures. It was open to a party to bypass those

procedures because section 133 (as it was then framed) made the Board available “*despite* the grievance and arbitration provisions in a collective agreement”, and upon receipt of a referral, the Board had “*exclusive jurisdiction* to hear and determine the difference or allegation raised in the grievance referred to it”.

11. However, that is no longer the statutory scheme. As a result of Bill 31 (proclaimed June 26, 1998), the Board now has a *discretion* to refuse to entertain such referral. That is what the union urges the Board to do in this case. The union urges the Board to “defer” to the expedited arbitration procedures found in the parties’ collective agreement.

IV - Some history

12. This is the first case in which the Board has been asked to exercise what might be described as its new “deferral discretion” under section 133(4) of the Act. However, this is not the first time that the deferral issue has surfaced between these parties. On the contrary, the parties addressed the *very same question* a few months ago under the former version of section 133. There, as here, the union urged the Board to defer to the expedited arbitration procedures in the parties’ collective agreement, and there, as here, Kennedy urged the Board to take jurisdiction. At paragraphs 8-13 of *Kennedy #1*, the Board summarized the union’s argument this way:

9. The union argues that the grievance should be heard by the “permanent arbitrator” established under the expedited arbitration provisions of the collective agreement. The union says that these procedures were triggered *before* the employer made any reference to the Board under section 133 of the *Labour Relations Act*, and that because the “private process” was already underway, section 133 is no longer available to the employer. In the alternative, the union urges the Board to *defer* to the mechanism that the bargaining parties (i.e. the “institutional parties” - MCAT and MCUTV) have established to resolve disputes about the application of their collective agreement.

10. The union points out that the expedited arbitration system was established through a process of free collective bargaining between the union on one hand, and the employer association of the other; and that the result was intended to be binding on *all* of the employers and employees covered by the collective agreement. In the union’s submission, MCUTV and MCAT are sophisticated parties that understand the needs of their industry, so that it makes sense for the Board to try to accommodate their shared intention. The union submits that, from a policy point of view, the Board should try to reinforce the product of free collective bargaining.

11. The union maintains that the institutional parties have established an expedited arbitration process that is specifically tailored to the requirements of their sector of the construction industry, and they have provided for a single, permanent, adjudicator, who was selected by them because of his expertise. In the union’s submission, that single adjudicator can respond much more quickly than the Ontario Labour Relations Board; moreover, a single “umpire” who hears all of the cases, is much more likely to achieve the uniform interpretation of the collective agreement that the institutional parties require. In the union’s view, it is a laudable effort at industry self-regulation, which the Board should support.

12. In the union’s submission, this “private system” guarantees a level playing field for all of the unionized employers and employees covered by the collective agreement, and establishes an arbitration mechanism that is clearly superior to the one available under section 133 of the *Labour Relations Act*. Not only is the negotiated scheme a more specialized process, tailored to the needs of the industry, but it is also faster, more flexible, and more effective than the statutory alternative. It ensures the prompt and equitable resolution of disputes, which, the union says, promotes the goal of industrial peace.

13. The union urges the Board not to undermine the negotiated system, which the bargaining parties have developed *precisely because it was better than the option better available under section 133 of the Labour Relations Act*. In the union’s submission, section 133 should not be read so as to preclude a *more efficacious* private process.

13. The union makes much the same argument in the instant case, and points out that the statute has been changed since the Board's decision in *Kennedy #1*. However, the relevant provisions of the collective agreement have not changed.

14. The collective agreement under review is the product of negotiations between the union, on one hand, and an employer association named "MCAT" on the other. The union represents employees doing masonry work. MCAT represents "unionized" employers in the masonry business. These "institutional parties" engage in "industry-wide bargaining", which produces a so-called "master agreement" that is binding on the various union parties, the employers (like Kennedy) who are members of MCAT, and the employees. The master agreement establishes uniform terms and conditions of employment, as well as a common framework for resolving employer-union disputes.

15. There is no dispute that, as a member of MCAT, Kennedy is bound by the master agreement. In fact, there was a representative of Kennedy on the MCAT bargaining committee that negotiated the master agreement. So whether or not Kennedy *agrees* with the expedited arbitration provisions, their presence in the agreement can come as no surprise. Kennedy was "at the table" when the agreement was concluded.

16. The master agreement contains some fairly standard provisions respecting wages, hours of work, benefits contributions, prohibitions against using non-union labour, and so on. However, the agreement does much more than fix the terms of the "wage-work bargain". The agreement also contains a number of provisions designed to guarantee compliance with the negotiated terms. These provisions ensure that aggrieved parties will obtain timely redress for breaches of the collective agreement. However, they *also ensure that no employer will derive a competitive advantage from either non-compliance or delayed compliance with its collective bargaining obligations*. These latter objectives are extremely important from *both a union and employer perspective* - as the both a union and employer perspective Board observed in *Kennedy #1*:

39. It is easy enough, therefore, to see why *trade unions* might want to maintain uniform wage rates, and will try to enforce compliance with the negotiated terms. The effective enforcement of the agreement provides immediate benefits for their members, and acts as a deterrent for other employers, who might be tempted to dodge their contractual obligations. So, from a trade union point of view, "policing the agreement" is important.

40. However, *unionized employers* are also interested in these objectives. Indeed, in this regard, *unions*, and *unionized employers*, share a common interest.

41. No doubt most employers in the construction industry have as little appetite to deal with trade unions as employers in other sectors of the economy. There is nothing unlawful or particularly surprising about that. Being "non-union" can sometimes give a commercial advantage, because it usually means lower labour costs.

42. However, once a group of companies becomes "unionized", *those same employers* have an economic interest in maintaining the negotiated rates - which is to say, preventing their unionized competitors from undercutting those rates, either through negotiating "preferential treatment" or through undetected non-compliance with the collective agreement. In either case, the unionized competitor can obtain an illegitimate cost advantage, that works in its favour in the bidding contest, and to the detriment of both *unionized employees* and *other unionized employers*.

43. While all of this may seem obvious, it is worth emphasizing again that, once bound by a collective agreement, all unionized *employers* have an interest in ensuring that those against whom they bid do not obtain a competitive advantage by undercutting the negotiated wage rates. Employers want a level playing field. They want the collective agreement effectively enforced. That is why there is often broad *employer support* for expedited arbitration mechanisms of the kind that one finds in the master agreement between MCAT and MCUTV. Employers benefit from contract compliance, and are prejudiced if the agreement is not properly "policed".

17. The special enforcement mechanism (of which expedited arbitration is a part) serves a number of related purposes. First of all, in a construction industry context where time is “of the essence”, it provides an expeditious procedure for remedying collective-agreement violations. (For a discussion of the problems of collective agreement compliance in the construction industry see *Kennedy #1*, paragraphs 31-67.) In the absence of such procedures, unions might be tempted to resort to the “self-help” approach of strikes or picketing - actions which would have a disruptive effect on the entire construction site (again, see the discussion at paragraphs 49-52 of *Kennedy #1*). However, what is equally important, from an institutional point of view, is a web of supporting provisions that ensure that all unionized *companies* will operate “on a level playing field”. These provisions guarantee that defaulting employers will be deprived of any benefits flowing from non-compliance with the collective agreement, and will face additional levies and costs if they try to operate outside the negotiated regime. The purpose of these financial *sanctions* is to discourage deviations from the negotiated norm. To put the matter colloquially: they help keep the members of MCAT “in line”.

18. This deterrent effect is, of course, important to the union. But it is also of real interest to the unionized competitors of the defaulting employer, and in a significant sense, reinforces the system of multi-employer bargaining. For, if individual employers were able to avoid or delay the application of the collective agreement, the multi-employer bargaining system would quickly crumble, because it depends upon all employers adhering to the master agreement despite commercial pressures to do otherwise. The enforcement mechanism therefore has an institutional value, quite apart from the recovery of monies owing in a particular case. It helps reinforce and bind the employers to the “master bargaining process” - a process which contributes to stability in this sector of the construction industry.

19. In *Kennedy #1*, the Board was quite sympathetic to the union’s argument that the dispute should be dealt with under the provisions of the master agreement. The Board observed:

68. From a purely “policy” point of view (i.e. what is best for labour relations in the construction industry), it seems to me that the union’s position is unassailable. After all, section 2 of the *Labour Relations Act, 1995* includes these stated “Purposes”:

- To recognize the importance of workplace parties adapting to change.
- To encourage co-operative participation of employers and trade unions in resolving workplace issues.
- To promote the expeditious resolution of workplace disputes.

69. The expedited arbitration mechanism is consistent with *all* of these themes. The institutional parties in this case have adapted to the changing environment of the construction industry. They have participated in developing their own mechanism for resolving workplace disputes. And they have created a more expeditious process than the one available under the statute, in a context in which expedition is important. In fact, despite Kennedy’s objection, the institutional parties’ arrangement probably accomplishes the stated statutory objective much *better* than the statutory model does. Moreover, it makes no demands at all on the public purse.

70. Now, no doubt, in 1975, [when section 133 first entered the statute] no one seriously believed that bargaining parties would, or could, negotiate their own expedited procedures. Nor did they - then. That is why legislative intervention was necessary; and, even today, the prospect of a hearing within 14 days of filing a grievance is relatively speedy compared to most negotiated alternatives. The fact remains, however, that construction collective bargaining at the millennium is not the same as it was 30 years ago, so that at least in some settings, section 133 is arguably redundant because the parties have effectively addressed the problems themselves.

Nevertheless, the Board ultimately concluded that section 133 (as it was then framed) required the Board to take jurisdiction. The Board went on to say:

95. I recognize that what I have described as the “pre-emptive effect” of section 133 may inhibit the ability of parties to negotiate private systems that are *better* than the statutory model, that those private systems can relieve pressures on the public purse, and that they are in no way inconsistent with the policy thrust of section 133. I also recognize that, when section 133 was enacted in 1975, there was little prospect of a privately negotiated system that was as expeditious as the one in the agreement before me in this case. So, to this extent, it might be said that section 133 is obsolete (at least in some settings), and that the Board “should” have the general discretion to defer to private processes that are just as effective as the statutory alternative. Such discretion exists in Section 96 of the Act (the unfair labour practice provisions), and there is a good argument that it “should” exist in section 133 as well.

96. However, that is a matter which must be addressed by the Legislature. I do not think that such discretion can be found in section 133, as it is currently framed.

20. The statute was amended five months later, so that the Board now has the “discretion” which it lacked when *Kennedy #1* was decided.

V - An aside on the Bricklayers’ enforcement system

21. The Bricklayers’ enforcement system is a fundamental component of the collective agreement, and, as we have already noted, that system has as much to do with bolstering institutional relationships as securing redress for individual claims. It was the parties’ answer to widespread problems of non-compliance in their sector of the construction industry - problems which were undermining both the integrity of the master agreement and the efficacy of master bargaining. However, because expedited arbitration is an element in this integrated whole, it may be useful to look briefly at some of the special features of the negotiated scheme. These features help illuminate the institutional context within which our section 133 discretion might be exercised, and may bear upon the “penalty clause” argument which Kennedy says should prompt this Board to take jurisdiction (see below). And, as will be seen, the system operates at a number of levels, and has a “regulatory flavour” which is very different from, say, a bilateral contract for the purchase/sale of goods, or even a typical bilateral collective agreement. There is no obvious “common law benchmark” or point of comparison.

* * *

22. The Toronto Residential Construction Labour Bureau (“TRCLB”) represents *builders* who engage the masonry subcontractors represented by MCAT. Strictly speaking, the TRCLB is not a negotiating party to the masonry collective agreement or the direct employer of any of the bricklayers (etc.) represented by the union. Nor is the TRCLB a party to the general provisions of the MCAT collective agreement. Nevertheless, the TRCLB has “signed on” to the enforcement portion of the agreement, and has undertaken to advise the union of any residential projects where masonry work will be done. The TRCLB has also agreed to supply the name of any masonry subcontractor to whom the work has been awarded. In both cases there are “penalties” payable by the TRCLB (to the expedited arbitration administration fund) for failure to give the proper notices.

23. At first glance it might seem odd that a “third party” has been drawn into the bargaining relationship between the union and MCAT. However, upon reflection, this makes sense. Ineffective enforcement procedures might lead to instability on building sites or a breakdown of the master bargaining system - both of which impinge upon the interests of the TRCLB. The “builders” have an interest in orderly, industry-wide collective bargaining arrangements, as well as the effective resolution of grievances without stoppage of work. That is why the TRCLB has agreed to be added to the collective agreement in order to facilitate uniform enforcement across this sector of the construction industry. The builders have joined forces with the union and MCAT to help regulate and stabilize the industry.

24. Information from the builders allows the union to pinpoint MCAT members who are engaged in construction work to which the collective agreement applies. That information facilitates enforcement. However, it is interesting to note in this regard that the union is *specifically obliged* to apply the agreement, uniformly, to all of the employers bound by it. There is an express undertaking, binding *the union* to make sure that all employers are treated alike, and that all employers “toe the line”.

25. The agreement specifically prohibits favouritism, “private deals” or selective enforcement of the collective agreement. The union must maintain a “level playing field”; and to bolster this obligation the union must establish an “investigation committee” to consider

“any complaint that the union business representatives or union members have agreed to and/or condoned violations of the collective agreement or otherwise failed to take appropriate action or acted inappropriately in dealing with violations of the collective agreement and/or the bricklaying enforcement system with builders, primary masonry contractors and/or masonry contractors.”

Such complaints can lead to charges under the union constitution or a reference to the permanent expedited arbitrator. Article VII of the enforcement mechanism provides, in part:

Where the arbitrator is satisfied that the union, a masonry contractor, a prime masonry contractor or builder has engaged in a deliberate concerted effort to undermine, evade or avoid the provisions of the collective agreement and/or this Bricklaying Enforcement System, the arbitrator may apportion responsibility for such acts against the union and any builder, prime masonry contractor and/or masonry contractor and award the payment of damages and/or penalties payable to the expedited arbitration administration account only, in addition to any and all sums payable through the expedited arbitration system hereunder ...

26. In other words, not only can a defaulting employer be required to remedy its breach of the collective agreement, but *the union* can also be liable for condoning or facilitating deviations from the negotiated terms. So can a “builder” who helps an MCAT subcontractor avoid the terms of the collective agreement. And union officials, too, can be penalized for permitting any divergence. So what these provisions do, is bind all industrial participants to a common objective: maintaining the negotiated terms.

* * *

27. Under the enforcement mechanism, the union and employer alike are required to supply letters of credit to secure payment for sums arising under the collective agreement. Neither party can shelter behind an apparent “inability to pay”. Defaulting employers can also be required to post security for future liabilities. In addition, under the heading “Builders Holdback”, Article III of the enforcement system provides:

The union may, at any time, at its option, activate the holdback mechanism described herein. The holdback mechanism is in addition to, and separate from, the expedited arbitration process.

As in the case of the notice provisions (an “early warning system”), the builders are enlisted to promote compliance with the negotiated terms.

28. These various provisions are separate and distinct from the arbitration mechanism. But they either supplement that arbitration process or ensure that arbitration will not be a fruitless exercise. They also provide that in the sometimes volatile commercial environment of the construction industry, employers must maintain the financial ability to meet their obligations. Again, to put the matter colloquially: they keep employers and union officials “in line” by making it expensive for them to

ignore the terms of the agreement. Speedy redress is supplemented by negotiated penalties for breaching the agreement.

* * *

29. The expedited arbitration procedures contain a number of features that are quite different from the statutory scheme, and are also quite different from what one normally finds in collective agreements. For example, service of the grievance can be effected by fax, and a hearing can be held on very short notice, (as little as 48 hours) in the evenings, at the union's premises. And in scheduling the hearings, the arbitrator need not accommodate the schedule of any legal counsel who may be retained.

30. In the negotiated system, time is very much "of the essence", and the ability to cause delay has been very carefully circumscribed. The institutional parties have fashioned a regime which largely forecloses what, in other contexts, might be a more leisurely litigation process, susceptible to normal "litigation tactics". These clauses prevent an employer from "buying time" while it carries on business outside the collectively-bargained framework. They ensure that, in all likelihood, there will be a "legal answer" while the job is ongoing, and before the employer and the affected employees have drifted away to some other project or work site. (For a discussion of the practical labour relations consequence of delaying tactics see *Kennedy #1*, paragraphs 46-53.)

31. The enforcement mechanism also contains a number of provisions respecting remedies, once a breach of the collective agreement has been established. For example: under item 8, the arbitrator has no "jurisdiction to apply any principles of estoppel or waiver to reduce any amounts payable by the masonry contractor in respect of [a violation of the collective agreement]"; the employer found in breach of the collective agreement is responsible for the arbitration and collection costs; and, pursuant to Article 19.07(d) (which stands apart from the enforcement mechanism itself) the employer must pay an additional 10% of the unpaid amount to the trade union. All of these provisions encourage employer compliance, and operate as a deterrent to those employers who might be tempted to depart from the terms of the collective agreement.

32. There are similar incentives and deterrents aimed at employees.

33. If an employee files a timely grievance in respect of non-payment of certain monetary items (wages, overtime premiums, etc.), the employee may receive full recovery, plus an additional percentage of the unpaid amount. On the other hand, a tardy grievance will attract less than full recovery, with the difference being directed to the expedited arbitration administration fund. Thus, as in the case of employers, there are financial incentives for desirable behaviour and financial disincentives for undesirable behaviour.

* * *

34. We do not think that it is necessary to multiply the examples. It is evident that the "institutional parties" have negotiated an elaborate code, with detailed provisions to encourage compliance with the negotiated terms and specific sanctions to discourage non-compliance. These incentives and disincentives are applicable to unions, employers, and employees alike. And the parties make no bones about the fact that some of these provisions involve financial "penalties" for conduct that is corrosive to the collective bargaining regime.

35. The agreement is a multi-faceted response to what counsel for the union described as a pervasive pattern of "cheating" that prevailed prior to the 1995 round of bargaining - individual employers who undercut the negotiated rate for competitive advantage, individual employees who accepted lower rates to secure access to work, and union officials who were less than diligent or

engaged in “favouritism” in respect of particular contractors. That is the situation that contributed to the 1995 strike; and that is what prompted the institutional parties to negotiate what they hoped would provide a solution. And, according to union counsel, the system is working. The enforcement mechanism has discouraged behaviour that, before its introduction, was threatening the integrity of the collective agreement and the collective bargaining process itself.

* * *

36. Among the negotiated provisions of the “enforcement system” are those that provide for expedited arbitration. Item 13 of the expedited arbitration process reads as follows:

13. This arbitration process shall be in addition to and without prejudice to any other procedures and remedies that the parties may enjoy including applications to a Court; or to the Ontario Labour Relations Board pursuant to section 96 of the *Labour Relations Act, 1995*, as amended; or under the *Construction Lien Act*; or any other operative legislation; or provided under any collective agreement. Any Grievance concerning the interpretation, application, administration or alleged violation of the Collective Agreement may be processed through the grievance/arbitration procedure outlined in Articles 4 and 5 of the Collective Agreement or under this Expedited Arbitration Procedure or referred to arbitration pursuant to section 133 of the *Labour Relations Act, 1995* provided however that any grievance may not be processed under more than one of these arbitration mechanisms. **Where a Grievance has been properly referred to the procedure provided for in this Bricklayers’ Bricklaying Enforcement System, it is understood and agreed that all of the parties shall be deemed to have waived any right to refer the Grievance to arbitration under section 133 of the *Labour Relations Act, 1995* or pursuant to Articles 4 and 5 of the Collective Agreement and any such referral shall be null and void. It is understood and agreed that the Arbitrator’s decision is final and binding with respect to those matters remitted to the Arbitrator. The Arbitrator shall have all the powers of an Arbitrator under the *Labour Relations Act, 1995*, as amended, including but not limited to the power to require records and/or documents to be produced prior to and/or at the hearing and the power to issue summons to witness and thereby compel attendance. The decision of the Arbitrator, inclusive of orders for payment of any monies in respect of damages, costs, Arbitrators’ fees and/or penalties, is deemed to be a decision of an Arbitrator pursuant to the *Labour Relations Act, 1995*, as amended, and enforceable as such.**

(emphasis added)

37. These are the provisions that were before the Board in *Kennedy #1*, and are before this panel again in the instant case.

VI - Discussion

38. Given the language of section 133 (as amended), there is no question that this Board has jurisdiction to entertain the referral. The question is whether the Board *should* do so in the circumstances of this case.

*

39. If one begins with the language of the collective agreement itself, there is no doubt whatsoever about the intention of the negotiating parties. Their language could not be clearer (see item 13 reproduced above): they intended to create an expedited arbitration process that specifically and unequivocally ousts section 133 of the Act, once a reference to expedited arbitration has been made (as it was here). That objective may not have been totally achievable under the former version of section 133. But the statute has now been changed; and it is difficult to resist the conclusion that the recent amendment was intended to facilitate the very kind of self-regulation that the parties have engaged in here. Accordingly, fidelity to the collective agreement language and the apparent purpose of the statutory amendment *both* support deferral to the privately-negotiated arbitration process.

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40. The Bricklaying Enforcement System was negotiated by sophisticated institutional parties in an effort to cope with a range of problems in their sector of the construction industry. As counsel explained, it was part of a package of revisions that settled the 1995 strike - a strike which was, in part, a response to widespread abuse that was undermining the provisions of the master agreement, as well as the master bargaining process itself. That is the problem which prompted the institutional parties to create the multi-faceted mechanism described above - including the system of negotiated incentives and penalties. It is a form of self-regulation with which (in our view) the Board should be reluctant to tinker.

41. It is also important to emphasize that, from a labour relations perspective, there is nothing unconscionable about the enforcement mechanism, or the objective that it is designed to achieve; moreover, it emerges from an institutional setting *in which individual employers are not obliged to participate*. Individual employers do not have to belong to MCAT. Individual employers can decide to negotiate on their own. However, once they decide to band together to negotiate a master agreement, it is hardly surprising - indeed it is commercially sensible - that the union and the employer association would fashion a framework from which participants could not deviate. Otherwise there would be little value in multi-employer bargaining.

42. From this perspective, therefore, the expedited arbitration component of the system is more than just a simplified procedure for collecting monies owing. It is one element in a broader framework designed to achieve a level playing field for the employer-competitors bound by the master agreement. It bolsters the collective-bargaining regime. And it does that (in part) by imposing an expedited arbitration process, as well as a schedule of financial penalties on parties who deviate from the negotiated norm. To be colloquial once again: it is a system of "carrots" and "sticks" which the institutional parties (and the builders) hope will bolster both the bargaining process and the bargaining outcome.

43. In our view, it is inappropriate to separate the arbitration component from the overall regulatory scheme, or to disregard the industry problems to which the parties have turned their attention. Nor, in our view, should the Board lightly embrace an interpretation which would fragment or frustrate that scheme. For not only is the enforcement process a sensible one, given the parties' history and problems, but in our opinion, there is no reason for the Board to insert itself into that process. To put the matter another way: there is no reason for the Board to usurp the role that sophisticated institutional parties have so clearly consigned to the expedited arbitrator.

44. The expedited arbitration mechanism devised by the parties is faster, more flexible, and just as "final" as the process available under section 133 of the Act; and the permanent arbitrator's decisions are just as "enforceable" as those of the Board (pursuant to sections 48(18)-(20) of the Act). It is a process which is neither substantively nor remedially deficient. Moreover, the permanent arbitrator will have an expertise and sensitivity to the parties' needs. That is what flows from a system in which the "permanent umpire" will see the whole range of issues which surface in this corner of the industry. That, no doubt, was one of the reasons why the institutional parties opted for a "permanent umpire" system.

45. It is evident that the institutional parties have carefully selected the adjudicator and tailored his/her jurisdiction to their own needs. They have created their own model of self-regulation. They have "customized" their own arbitration forum. And, in our view, there is no reason to prefer the Board's processes over those created by the parties themselves - particularly since the parties have equipped the arbitrator with an arsenal of specific remedial tools to deal with the problems that s/he may face. Indeed,

as the Board observed in *Kennedy #1*, this “private system” probably accomplishes the statutory objective much better than the statutory model does.

46. In summary, the “private process” is completely congruent with statutory objectives, is no less effective, and, of course, makes no demands at all on the public purse.

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47. Counsel for Kennedy submits that it is inappropriate to force the company into a forum where equitable relief may not be available, or where the company might be subjected to offensive “penalty clauses” which, he says, the Board might decline to enforce. Counsel submits that these burdens would be avoided if the Board took jurisdiction, because, he says, the provisions in question can only be utilized by the expedited arbitrator. In other words (according to counsel) by coming to the Board, Kennedy would not only enjoy a more leisurely litigation process, it would also be relieved from certain provisions of the collective agreement (for example, paying the union’s collection costs or a 10% surcharge in addition to any unpaid amounts).

48. However, there are a number of problems with these propositions.

49. In the first place, it is by no means clear why the Board *should* take jurisdiction simply to relieve an employer of a burden that was freely negotiated by an employer association, and that would obtain in the domestic tribunal that was specifically created to enforce those terms. If anything, these negotiated differences of approach might prompt the Board to defer to the domestic alternative, which has been so carefully constructed by the parties to produce a result that is *different* from the one that would obtain under section 133 of the Act. That, after all, is the thrust of the amended section 133 - which now permits parties to construct their own arbitration alternative to which the Board may defer. And as we have already observed: there is no collision between the objectives of the statute and the provisions that the parties have negotiated in this case.

50. Nor is it evident why this Board should decline to enforce substantive terms, merely because those terms may be found in the grievance-arbitration provisions of the collective agreement. Section 133(1) makes the Board available as an arbitral *forum* despite the grievance-arbitration provisions of a collective agreement. But the focus of section 133 is on *forum*. Nothing in section 133 requires the Board to ignore provisions which are otherwise applicable to the case before it. In fact, the inclusion of section 48(16) (dealing with time limits) suggests the contrary - that the Board may be required to consider and apply provisions that are typically found in the grievance procedure portion of the collective agreement.

51. Now there may be cases where the Board might be inclined to interpret section 133 in order to ensure that a case gets dealt with on its merits rather than some “technical ground”. That is perhaps part and parcel of the provisions making the Board available to deal with construction industry grievance problems “despite the grievance and arbitration provisions in a collective agreement”. The Board can be used if the domestic alternative is procedurally, substantively or remedially inadequate. However, where the collective agreement contains an equally efficacious process, together with negotiated remedial provisions (the “Letters of Credit clause”, for example), we see no reason why this Board would not enforce them, in the same way as the expedited arbitrator would. And if that is so - as we believe it is - there is no particular reason to prefer the publicly-funded over the privately-funded arbitration alternative.

52. Kennedy submits that it is “offensive” to be subjected to a regime which precludes an argument based on estoppel. Kennedy objects to the absence of “equitable relief”. But assuming, for the moment, that the Board *could* disregard this provision of the collective agreement, is there any

reason why the Board *should* do so? Is this term inconsistent with the Act, or in any way antithetical to the collective bargaining scheme? In our view, the answer is no.

53. Section 1 of the Act requires that the terms of the collective agreement be in writing, and there was once some debate about whether the doctrine of “estoppel” could be available to relieve against the strict application of those terms (see, for example: *Re Sarnia General Hospital and London District Building Service Workers’ Union, Local 220, S.E.I.U.* (1972), 30 D.L.R. (3d) 660). It was argued that an arbitrator was not permitted to depart from the “writing” contemplated by the statutory definition - particularly if the agreement contained a clause (as they usually do) requiring fidelity to the written words. However, that is no longer the prevailing legal view. It is now fairly well accepted that arbitrators have the authority to apply estoppel in a collective agreement context.

54. On the other hand, there is no reason why the bargaining parties cannot, by express language, require strict adherence to the written terms, or exclude the potential effect of collateral representations. Clauses like that are not unknown in other commercial contexts (real estate transactions, for example). And here they have a valid collective bargaining purpose: to ensure a level playing field.

55. In a system where all employers must abide by the same bargain and union officials can be penalized for permitting any deviations, it is hardly surprising that the parties would attempt to exclude common law notions that might relieve an employer of its obligations - which is to say, that would not only deprive employees of a remedy, but would also give one employer competitor a commercial advantage over another. The purpose of bargaining through MCAT is to ensure that all employers will be bound by the same rules, and the purpose of the enforcement mechanism is to deter deviations. In that context, there is nothing offensive about preventing deviations from the contractual norm founded on collateral representations, or preventing the importation of common law notions antithetical to the collective bargaining objective. A provision preventing waiver or estoppel is not only “fair” from the point of view of other employer-competitors, it is also consistent with the institutional needs of the negotiating parties.

*

56. Counsel further argues that the collective agreement contains “penalty clauses” which, he says, this Board would not apply, either as a matter of “public policy” or based upon what might be described as a “common law approach” to collective agreement interpretation (i.e. if a contract clause does not envisage a genuine pre-estimate of actual damages - as an additional surcharge would not - then the clause may be “void” and unenforceable). Counsel therefore urges the Board to take jurisdiction to avoid the application of these “penalties” at the hands of the expedited arbitrator, whom, he says, is more likely to apply the agreement in accordance with its terms.

57. But, again, there are a number of problems with this position.

58. If there is a valid legal argument preventing the application of certain collective agreement provisions, the expedited arbitrator is as capable of dealing with that legal argument as the Labour Relations Board, acting as arbitrator. In both cases, the adjudicators derive their authority from the collective agreement and from section 48 of the *Labour Relations Act*; and in both cases, the adjudicators are required to interpret the collective agreement in accordance with the established law. If a collective agreement provision is “void” or unenforceable for some reason, an arbitrator is fully equipped to make that finding.

59. More fundamentally, though, there is nothing in the *Labour Relations Act* which prevents “penalty clauses” of the kind that are found in this collective agreement; and there is nothing on the face of section 133 which allows the Board to ignore provisions which it might think are unduly

onerous, (be they some financial penalty or the kind of “specific penalty” mentioned in section 48(17) of the Act). Nor is there any reason (or perhaps jurisdiction) for an arbitrator to import some common law notion to nullify the plain language of the collective agreement. For as the Supreme Court of Canada has reminded us in *McGavin Toastmaster Ltd. v. Ainscough et al.*, [1976] S.C.R. 718, common law contractual notions have very limited application to collective agreements; and in cases such as *Union Carbide v. Weiler et al* (1968), 70 D.L.R. (2d) 333 (S.C.C.), that Court has also reminded arbitrators that they have no authority to ignore the negotiated consequences of the parties’ language, simply because the arbitrator believes those consequences to be unfair. That is why the Legislature has added section 48(16) to the Act to modify the impact of “mandatory” time limits. Without such authority, an arbitrator might be obliged to reject a claim even though that consequence was out of all proportion to the time limit breach (a “penalty”, as it were).

60. In this regard, the situation is quite different from the collision with a collateral statute which must, of course, override the provisions of the agreement. If there is an operating incompatibility between the collective agreement and a statute, it is the statute which must prevail. For example, if a statute prescribes the maximum amount of interest that may be charged and such statute applies to collective agreements, the agreement cannot exceed the stipulated ceiling. However, in the absence of some statutory override, it is not at all clear why a “penalty” should not be enforced - just as an arbitrator might be obliged to enforce a mandatory time limit, were it not for section 48(16) of the Act. Nor is it clear where an arbitrator - which is what the Board is under section 133 - gets jurisdiction to decline to enforce the negotiated terms (in effect rewriting the terms of the collective agreement). Certainly there is nothing like section 48(16) which expressly confers that authority.

61. It must also be remembered that the so-called “penalty clauses” in this case are part of a broader scheme with a significant institutional purpose, beyond the sums of money involved. They cement institutional collective bargaining relationships which have no common law counterpart, and they reflect the exercise of “bargaining power” which is recognized and sanctioned by the statute. It is also worth repeating that the so-called “penalties” are in the collective agreement because a union and employer association have agreed to put them there. They are part of a broader scheme of regulation, thought to be in the common collective interest. They do not stand alone.

62. Against that background, the “common law question” (“is this a genuine pre-estimate of liquidated damages?”) is quite simply irrelevant. It not only presupposes that collective agreements must conform to common law norms (which they do not), and that arbitrators may decline to apply provisions which they consider unduly onerous (which is quite problematic), but also that the exercise is one of balancing some *economic equation* - irrespective of other *bona fide* institutional considerations or collective bargaining purposes for the provisions under review. But to focus solely on the monetary arithmetic completely ignores the overall purpose of these clauses, as well as the language and intent of the negotiating parties. And, in context, we do not find the “penalties” in this agreement to be particularly offensive in any event.

63. Accordingly, the fact that these clauses may seem onerous to a defaulting employer, or might involve negotiated “penalties” is neither a reason why this Board would not enforce them, nor a reason why this Board should take jurisdiction lest the “private arbitrator” be more inclined to do so.

* * *

64. In summary, when the circumstances of this case are considered as a whole, we see no reason to take jurisdiction over the underlying grievances.

65. In our view, it makes more sense to refuse the referral pursuant to section 133(4) of the Act, so that the matters can proceed to resolution in accordance with the negotiated provisions of the master agreement.

VII - Concluding Observations

66. Counsel for Kennedy submits that it is important for the parties to “know the rules of the game” - that is, to understand in light of the recent amendment, when the Board will defer, when it will not, and how the Board’s approach may be different from the one adopted by the “private arbitrator”. Counsel submits that until these “rules” are clarified, parties like Kennedy will have to make referrals to the Board simply to clarify their options.

67. We can appreciate the community’s desire for guidance about how the Board may exercise its new jurisdiction to defer to privately-negotiated alternatives. To some extent, this decision may provide some illumination. However, at this early stage, it is probably unwise to be too definitive. All that can be said is that *the Board might be less inclined to defer and more inclined to hear a matter itself*:

- if the alternative arbitration process under the collective agreement was more cumbersome, slower, or remedially inadequate;
- if the alternative arbitration process was unlikely to deal with the real substance or merits of the case, thereby precipitating labour relations discord;
- if the subject matter of the grievance could not be dealt with, or could not be dealt with completely, under the private process (thereby raising the spectre of double forums and double litigation);
- if there is an underlying jurisdictional dispute, unfair labour practice, successorship or related employer issue, or some third-party union interest which could not be adequately or economically dealt with by the private arbitration process; or
- if there were some other persuasive policy reason why the Board should deal with the case itself.

68. However, in the absence of compelling circumstances of this kind, it seems to us that the language of the collective agreement should prevail.

2484-95-U Murielle Waito, Applicant v. La Cité Collégiale Ottawa and Ontario Public Service Employees Union, Responding Parties

Colleges Collective Bargaining Act - Discharge - Duty of Fair Representation - Evidence - Unfair Labour Practice - Witness - College terminating applicant’s contract after three years’ employment in bookstore - Union grieving but grievance premised on acceptance of idea that applicant was contractual employee and not person in bargaining unit - Applicant alleging that union and college breaching Colleges Collective Bargaining Act (CCBA) in various ways related to fact that she was treated as contractual employee, rather than as member of bargaining unit - Board finding that union violated its duty of fair representation - Board also finding that college failed to renew applicant’s contract in response to her seeking intervention of union and that college maintained bookstore position as contractual, at least in part in order to avoid applicant being able to exercise rights as member of bargaining unit - Board drawing adverse inference from failure of college vice-president to testify regarding actual reasons for employer’s

non-renewal of applicant's contract - Application alleging that college violated section 75(2) of CCBA allowed

BEFORE: K. G. O'Neil, Vice-Chair.

APPEARANCES: Murielle Waito, Richard Dolbec, Gaétanne Caron, Christine Lalonde, Jacques Pelletier, Anitta Aaltonen, Lucie Grondin for the applicant; Anne Touchette, Diane Stang, Allan Stead, Michael Gottheil for OPSEU, Andre Champagne, Denise Couvillon for La Cité Collégiale.

DECISION OF THE BOARD; July 23, 1998

1. This is a complaint under the *Colleges Collective Bargaining Act*, (referred to below as the "CCBA") against the union, OPSEU, and the employer, La Cité Collégiale. In a preliminary decision dated October 11, 1996, the motions brought by the employer and the union to dismiss this matter for want of a *prima facie* case were dismissed.

2. There were seven days of evidence and argument, all of which has been carefully considered, even if not all set out below.

3. Ms. Waito complains that the union and the College have breached the CCBA in a variety of ways, related to the fact that she was treated as a contractual employee rather than as a member of the bargaining unit while she worked in the bookstore for more than three years. The underlying dispute is whether Ms. Waito should have been treated as an employee in the bargaining unit represented by OPSEU when the College terminated her contract in June, 1994.

The factual context

4. The Cité Collégiale, a community college in Ottawa, serving the Francophone community, opened to students in September, 1990. Ms. Waito started working in the College bookstore as a contract employee in May, 1991.

5. Ms. Waito's contract was initially for less than 24 hours per week, and indicated she was considered temporary help. However, her second contract, commencing August 30, 1991 (in its corrected form) shows on its face that she worked 35 hours per week, that she was buying books, and that it was not considered a project of an exceptional nature - all important facts in determining how the work she did is properly viewed under the collective agreement and the CCBA. The contracts in evidence demonstrate that she worked thirty-five hours per week for over forty weeks of the fiscal years 1992 to 1994. The breaks between contracts were few and were under two weeks, except for the period March 31 to June 15, 1992. However, before leaving for this break, Ms. Waito had a signed contract for her return. Eight weeks into the fiscal year, 1994/1995, she was advised of the non-renewal of a two month contract. The circumstances leading up to and surrounding that non-renewal directly precipitated these complaints.

6. Once a support staff employee is working more than twenty-four hours on a regular basis, there is reason to question why they are not being treated as part of the support staff bargaining unit prescribed by the CCBA. In order to monitor this, the union receives periodic lists indicating what employees are working on contracts, and for what hours. Ms. Waito was indicated as working 35 hours per week on at least one such list prior to her termination. In the fall of 1993, Daniel Gravel, a new union steward, talked to Ms. Waito about her hours of work, and status as a contractual employee, as part of an attempt to get to know the members of the bargaining unit. She and Ms. Waito discussed whether the position should be unionized. Ms. Gravel questioned the College about Ms. Waito's position among others, as to whether they should be in the bargaining unit.

7. Diane Stang, Local union president, worked with Ms. Gravel on monitoring the status of contractual employees at the College. She agreed with employer counsel that, for a number of years, the College and the union differed over the interpretation of the collective agreement as to the treatment on contractual employees. Their difference of opinion of this subject was still there at the end of May 1994. Before May 31, 1994, there had been no grievance about it. She also agreed that the posting process by which employees got permanent, bargaining unit, jobs was well understood and accepted. However, there is no evidence that shows that the union ever agreed that contractual people working more than 24 hours per week on work that was not a non-recurring project, or Ms. Waito specifically, were properly treated as not in the bargaining unit.

8. The evidence indicates that Ms. Waito was relatively satisfied with the situation at the College until the fall of 1993. And she testified that her relationship with her supervisor, Anitta Aaltonen, was satisfactory until January of 1994. Ms. Waito links the deterioration of her relationship with her supervisor with the fact that she was speaking with the union, although there is no evidence before me that Ms. Aaltonen knew that Ms. Waito was speaking to the union. Ms. Waito says that she realized things were not as she had hoped when one of her colleagues, Richard Dolbec, another contractual employee, was terminated, in the fall of 1993. Ms. Waito is of the view that the cause of Mr. Dolbec's termination was that management learned he had called the Labour Board to see if he could get paid for Labour Day. Ms. Waito said that it was after Mr. Dolbec's departure that she felt she had to do something, and spoke to the union.

9. Ms. Waito wished to bring further evidence about Mr. Dolbec and others' tenure and termination at the College, but this line of evidence was not allowed. It is my view that Ms. Waito's complaint did not refer to the situations of other employees in a way which would have put the responding parties on notice that there was any claim arising out of the others' situations, and there is no relief claimed for the others. Moreover, to allow evidence of the alleged wrongful treatment of other employees would have allowed similar fact evidence which was insufficiently probative on the issues in dispute, and which would unnecessarily protract an already lengthy hearing.

10. In the spring of 1994, the College declared that, retroactive to October, 1993, the position occupied by Ms. Waito was an Appendix D position. Appendix D is a portion of the collective agreement that gives people replacing unionized employees some rights under the collective agreement. These are limited to the right to be paid according to the collective agreement and to receive five percent vacation pay. An Appendix D employee may only grieve the violation of the above terms, and not other provisions of the collective agreement, such as the provision about discharge for just cause. In a May 4, 1994 memo to the union about this, Human Resources indicated that Ms. Waito held an Appendix D contract from October 25, 1993, to June 30, 1994. Those dates do not coincide with any of the written contracts in evidence, the latest of which was from May 2 to May 31, 1994.

11. When Ms. Waito received the notification that she had been designated Appendix D, she thought she had become a member of the bargaining unit. However, when she talked to Ms. Gravel she was told this was not the case. Since the person Ms. Waito was said to be replacing was still working in the bookstore doing the same functions as before, neither Ms. Waito nor the union accepted the categorization of her position as Appendix D. Although Ms. Gravel and Ms. Rainville of Human Resources had a number of exchanges about it, nothing was resolved.

12. In regards to Ms. Waito's Appendix D designation, Ms. Aaltonen testified that this occurred after Ms. Grondin, another bookstore employee, went from a contractual to a permanent position as a result of a posting. She said that they had to fill Ms. Grondin's position, and that Ms. Waito was classified Appendix D because she had the most seniority of the contractual people. She explained that after discussions with Mr. Pelletier, her superior, they determined Ms. Waito was the person who would

be there if there was a need after the competition. Ms. Aaltonen could not explain why Human Resources made the Appendix D designation retroactive to October 1993, why the union was only notified in May when the union is supposed to be notified at the beginning of such an assignment, or why the Appendix D contract supposedly expired on June 30, when there was a written contract expiring May 30.

13. Late in autumn 1993, when the budget process for 1994 started, Ms. Aaltonen asked for a permanent position in the bookstore, which was approved. Ms. Aaltonen emphasized it was not Ms. Waito's position per se, but one that would have to be filled in the normal course. There was a bookstore staff meeting on May 13, 1994 with Mr. Pelletier Director of Ancillary Services, which includes the bookstore. At the May 13, 1994 staff meeting, Mr. Pelletier indicated that contractual employees would be extended to June 30, 1994. Ms. Waito's contract was never extended in writing, and was not renewed after May 31, 1994.

14. Ms. Waito alleges that at the same staff meeting in May, Mr. Pelletier said, "Congratulations, your position has been finally approved." He denies saying this, and others who were at the meeting do not recall his saying this. However, Ms. Aaltonen acknowledged that by the time of this meeting, they knew that a permanent position had been approved for the bookstore. Although she underlined that she did not consider it Ms. Waito's position, it appears entirely possible that something was said about the budgetary approval at the meeting by Mr. Pelletier, despite his not recalling it in testimony. However, in the end, nothing turns on this, because saying the position was approved is not the same as promising Ms. Waito the position, given the process that all, including Ms. Waito, were familiar with - which included an application and interview process.

15. Ms. Waito maintains that she was constantly seeking to get a permanent job and was promised one by both Ms. Aaltonen and Mr. Pelletier. In the end, nothing turns on whether or not Ms. Waito was promised a job, since that cannot affect the statutory rights Ms. Waito claims were breached in this application. However, the matter is relevant to the background to this dispute. Both Ms. Aaltonen and Mr. Pelletier testified as witnesses for Ms. Waito, and denied promising Ms. Waito a permanent position. They both emphasized that any new permanent position had to go through the normal posting and selection process and neither had the power to promise or award a position to an individual. Further, Ms. Aaltonen said Ms. Waito did not ask how to get into the union, and sent her a note in 1993 saying she was fed up with the union, although that note was not offered in evidence.

16. As part of her evidence about being promised a permanent position, Ms. Waito said that she was shown plans for a new site for the bookstore, and that Ms. Aaltonen showed her where she would be working. Ms. Aaltonen denied that showing Ms. Waito the plans was to assure her of a permanent position and observed that everyone in the bookstore was invited to participate in planning the space, a process that had been going on since 1992.

17. Ms. Waito testified that when she would ask Ms. Aaltonen and Mr. Pelletier about a permanent position, they would put her off with statements about the budget process. Nonetheless she also gave evidence that, relying on what she saw as Ms. Aaltonen's promise of a permanent position, she cancelled all the permits on a small business, which she would not be able to operate if she had a permanent position. She said that the end of the business had nothing to do with the economic climate. She said that the loss of the position put her and her husband in a bad financial state. They tried to sell the business building, but were unable to.

18. It is my finding that neither Ms. Aaltonen, nor Mr. Pelletier ever promised Ms. Waito a permanent position in the sense of guaranteeing her such a position. On the other hand, it is understandable from all the circumstances that Ms. Waito thought she would shortly be getting a permanent position when it was announced in May, 1994 that a permanent position for the bookstore had been

approved in the budget. Although she was aware that she would have to go through a posting procedure in order to get a permanent job, under the system the College had in place when contractual positions were converted to permanent, she knew she was the most “senior” contractual employee and the person who had been buying the books for the store for three years. Further, there is no evidence that she had been told her employment was in question. To the contrary, both the memo about her status as Appendix D and Mr. Pelletier’s announcement indicated she would be extended again, to June 30.

19. When Ms. Gravel, the union steward, first spoke to Ms. Waito, the latter exhibited reluctance to talk to her at work, and they sometimes spoke on the phone instead. It became clear that Ms. Waito was having difficulties at work, centering around workload and her relationship with her supervisor. The evidence indicates that Ms. Waito was often upset at work, particularly in her last year at the College. Ms. Waito testified that she felt intimidated by Ms. Aaltonen. Ms. Aaltonen said Ms. Waito felt stressed by getting her work done, that she tried to help her but at some point Ms. Waito no longer wanted to speak to her, so she could not do very much. The two differed over what was reasonable to expect Ms. Waito to do in terms of computer work, and Ms. Aaltonen found Ms. Waito wanting in computer skills.

20. There was a considerable quantity of evidence about the details of Ms. Waito’s workload, and interactions with her supervisor. Ms. Waito believes that Ms. Aaltonen was trying to “get rid of her”, and asserted that it was related to her union rights. I do not consider it necessary to make any detailed findings of fact about the workload and interpersonal issues affecting the relationship between Ms. Waito and Ms. Aaltonen. The issue before me is not whether Ms. Waito’s workload was fair in a general sense, but whether she was dealt with negatively for reasons related to her union rights or rights under the CCBA. With the exception of the issues which will be dealt with below about talking to a union steward at work and the steward’s intervention in the matter of breaks, there is nothing in the evidence other than a temporal link, to connect Ms. Aaltonen’s dissatisfaction with Ms. Waito to issues of union or statutory rights.

21. As to the temporal connection, Ms. Waito dates her difficulties at work to the period when she started to talk to the union. However, there is simply insufficient evidence that Ms. Aaltonen knew she was talking to the union or reacted negatively because of it. Particularly in the absence of a reverse onus in the CCBA, I do not find that the evidence provides a basis for the inferences Ms. Waito asks to be drawn.

22. There was evidence that the union steward mentioned a complaint Ms. Waito had that there were no breaks in the bookstore, to human resources. Ms. Aaltonen denied that there were no breaks, although she acknowledged that they were not scheduled with precision because of workload demands. She recalled human resources asking if there were breaks, and having answered in the affirmative. However, she denied having any knowledge that the union had intervened in this matter, or that there had been a complaint from Ms. Waito, and there is no contradictory evidence. Thus, the evidence does not establish a causal connection between Ms. Aaltonen’s criticisms of Ms. Waito and the union’s intervention about breaks.

23. If anything, the evidence indicates the cause of the difficulties between Ms. Aaltonen and Ms. Waito, which Ms. Waito refers to as harassment, had other sources - that the two had a working relationship marked by differences, at least in the last year of Ms. Waito’s tenure in the bookstore, which centered on issues about the use of the computer. That they did not resolve them prior to Ms. Waito’s termination was affected, in my view, by significant differences in the personalities of the two women and the ways in which they express themselves. Mr. Pelletier said he was aware of the intimidation Ms. Waito suffered from Ms. Aaltonen, but when pressed for details, it was about workload, and difficulties in communication between Ms. Waito and Ms. Aaltonen, not union rights.

24. Both Ms. Waito and Mr. Dolbec, a co-worker, testified that they had been told that anyone from the union was to be sent to their supervisor. Two of Ms. Waito's witnesses who worked in the bookstore, Lucie Grondin and Christine Lalonde, gave contrary evidence, and said there was no prohibition against talking to the union in the bookstore. Ms. Aaltonen denied giving such a directive and said that it would not be in the interest of a manager to give such a directive. However, she said as a manager, she thought she should know what was going on in the bookstore. Similarly, Mr. Pelletier testified that the order of the day was that a person can talk to whomever they like, but that questions concerning contracts, hours, or job descriptions should be referred to a manager. At one point in her evidence, Ms. Waito said she told Ms. Gravel on her first encounter with her in the bookstore that she did not have the right to speak to her - that Ms. Grondin would tell Ms. Aaltonen, and that Ms. Aaltonen had instructed her to send anyone who asked questions about contracts to her office. Ms. Gravel says that neither Ms. Waito nor anyone else told her they were forbidden to talk to the union, or that there was a directive to send union representatives to see Ms. Aaltonen. She went to the bookstore several times, and talked to Ms. Waito when she wanted.

25. Given the conflicted nature of the evidence on this subject called by Ms. Waito, and the fact that the union witnesses were not aware of such a directive, I do not find that there was a directive that employees were not allowed to talk to the union in the bookstore. What is more likely than not, in my view, having considered all the evidence on the subject, is that some remark was made that questions about contracts should be referred to the manager, which was interpreted by Mr. Dolbec and Ms. Waito in the fashion that it was, because of concerns they had at the time.

26. Things came to a head around Ms. Waito's relationship with her supervisor in the end of May, 1994, when Ms. Waito called Ms. Gravel in obvious distress on May 30, 1994 saying that the situation was no longer viable. Ms. Gravel had been delaying taking any formal action about Ms. Waito's position, for fear that it would jeopardize her renewal as a contract employee. However, given the extent of Ms. Waito's concerns at the end of May, Ms. Gravel determined it was time to file a grievance.

27. On May 31, 1994, the union filed a policy grievance, claiming that the bookbuyer's position should be in the bargaining unit. The fact that the grievance did not claim that Ms. Waito should have the position was consistent with the union's focus on positions as falling within the bargaining unit, and the collective agreement's requirement that new bargaining unit positions be posted, with seniority as a factor in selection.

28. On the same day as the grievance was filed, but independently, and without the knowledge of the union, Ms. Waito made a complaint to the College vice-president that her supervisor was harassing her. Ms. Gravel was provided with a copy later the same day. Ms. Waito's employment was terminated the following day, June 1, 1994.

29. Ms. Waito says that when she was fired, she consulted Ms. Gravel who said there was nothing she could do for her. Ms. Gravel does not recall giving this advice, or talking to Ms. Waito after May 31, but granted that it was possible that she had. She recalls that prior to filing the May 31 grievance, she told Ms. Waito that she could not grieve personally as she was Appendix D, but that the union could. I found Ms. Gravel a very straightforward witness, who honestly seemed not to recall whether she had given Ms. Waito the advice that there was nothing she could do for her or not. Ms. Waito's recollection was somewhat inconsistent as well on other points and there is always the possibility that Ms. Waito misunderstood whatever Ms. Gravel said. However, having weighed the evidence on this point, it is my finding that it is more probable than not that Ms. Gravel did give her that advice or communicate in some way that the union could not help her after her termination. Otherwise, it seems odd that Ms. Waito, who had been regularly calling Ms. Gravel to share her

troubles, would abruptly stop doing so and go to an outside lawyer, with the attendant expense. The fact that there is no mention of the June 1 contact in a letter from Ms. Waito to Mr. Sauer of September 22, 1994, something that Ms. Waito wrote closer to the time of the incident than her pleadings or testimony, does not override this in my view. Ms. Waito did not recount all the same details each time she set out her experience at the College. Although the evidence would be stronger if she had included this particular detail, I am not convinced that its omission means it did not happen. The letter does indicate the composition of a committee investigating the termination and says that this information came from Ms. Gravel. There is no evidence of where else that information might have come from, and no suggestion that it came from management. So it also stands as some evidence that there was communication with Ms. Gravel after the termination.

30. Ms. Waito retained counsel privately, who communicated with the College by letter dated June 8, 1994. An investigation planned by the College into the harassment complaint was stopped after the lawyer's letter. A representative of human resources later told Ms. Gravel that the matter was in the lawyers' hands. Ms. Waito testified that her lawyer discouraged her from meeting with Mr. St. Jules to discuss her letter of May 31, as she had informed her lawyer that Mr. St. Jules was a friend and protector of Ms. Aaltonen. Employer counsel responded to Ms. Waito's lawyer's letter on July 13, 1994, confirming that she would not be reinstated.

31. The union grievance claiming the bookbuyer position as a bargaining unit position was resolved in August, 1994 with the result that a permanent position was to be created for the budget year 1995-1996. Ms. Waito was not aware of this resolution until the following year. In response to budgetary cutbacks, this position was later reserved by agreement between management and union representatives for a bumping process. It was filled as a permanent position in August, 1995. In the meantime, it was occupied by another contract employee, who worked 35 hours a week.

32. In late summer 1994, Ms. Waito contacted the union again, asking them to pay her lawyer's account. This was declined, by Mr. Alan Stead, the Ottawa Regional Representative, because, as he told Ms. Waito at the time, legal fees have to be approved in advance. As to the grievance, Mr. Stead recalls that he told her to contact the local. He denies he said the union couldn't do anything for her or that she could not file a grievance. He does not recall Ms. Waito asking him to have Ms. Gravel call her, or that neither of them called her back, as Ms. Waito alleges. In the end, nothing turns on the differences between Mr. Stead's and Ms. Waito's evidence, as any grievance would have been well out of time by the time Ms. Waito called Mr. Stead in any event.

33. After her conversation with Mr. Stead, and the lack of any further response from the union, Ms. Waito tried to get a response to her complaints through other channels. One of these was a contact with the Council of Regents, the provincial governing body for community colleges. This led to a referral to Mr. Sauer, President of an OPSEU Local in North Bay, and an OPSEU representative on a provincial union-management committee. Mr. Sauer came to Ottawa in October, 1994 to meet with the Local, Ms. Waito and other employees with related concerns. As a result of this meeting, a second grievance was filed on October 6, 1994, contesting Ms. Waito's termination.

34. Ms. Waito maintains that Mr. Sauer promised to pay her lawyer's bills and to make her whole. In this regard, we prefer Mr. Sauer's evidence that he did not make such a statement, and would not have done so. He underlined in his evidence that he did not know Ms. Waito at the time they had the phone conversation in which he is alleged to have made these promises, and had only heard her story for the first time. He wanted to hear the Local's point of view, and accordingly told her he would look into it. Although Ms. Waito is convinced that the union promised to pay her account, it seems unlikely, given the inherent probabilities, and the union's policy on the matter. It is more probable than

not, that Ms. Waito, hoping as she was that someone would take on her problem, misunderstood when Mr. Sauer said he would do what he could, and came to believe that he had made promises.

35. The discharge grievance went to arbitration in April, 1995. The college posed a timeliness objection, which was accepted by the arbitrator, who has no authority to extend time limits under the CCBA, as there is in the *Labour Relations Act*. The evidence is that the union's lawyer insisted that Ms. Waito have an opportunity to say what she wanted to say, and she explained her situation and the history of her employment. Ms. Waito gave evidence to the arbitrator about why the grievance had not been filed earlier, and was cross-examined. The arbitrator found the delay was not the union's fault.

36. In 1996, the management of the bookstore was contracted out, so that Ms. Aaltonen, although still working in the bookstore at the College, was no longer in the employ of the College when she gave evidence.

37. The evidence is clear that the process adopted by the College for approving permanent positions throughout the time period in issue involved managers' proposing positions during the budget process. If they were approved, the position then would be posted with a selection process which involved applications and interviews by a committee. No manager had the authority to either create or fill a bargaining unit position unilaterally, or to promise to do so.

38. Ms. Aaltonen testified that the reason that Ms. Waito was not in a permanent position in the bargaining unit although she worked 35 hours per week for more than three years was that the position remained a contractual one, which had not been through the process by which permanent positions are created and filled.

39. Mr. Pelletier gave evidence that the years in which Ms. Waito worked in the bookstore were difficult ones financially, and that permanent positions were not created in some instances for budgetary reasons, i.e. one could get the work done for less by maintaining the position as contractual. As to why the bookbuyer position was never posted, Mr. Pelletier recalled that it had been submitted several times and approved at least two years in a row. He said that in 1993, he asked that it be posted, but at the request of Mr. St. Jules, the Vice-President to whom he reported, he delayed. Mr. St. Jules wanted him to wait until the end of August or September, when all support staff would be back after the summer and could see such a posting. However, due to a further request for budget cuts in the fall of 1993, a decision was made not to post in the fall of 1993 either. In looking at how to save money, he said getting people on contract for the amount of hours needed, was one way of doing it, which would avoid creating a permanent position. Other measures available included decreasing inventory.

40. Mr. Pelletier also testified that he was aware of the situation where Ms. Waito's contract stated she worked less than 24 hours when she actually worked 35 hours. He testified quite candidly that management knew that after a while with a contract showing more than 35 hours, the right to join the bargaining unit would be brought up. Giving out a 24 hour contract, he said, they were right under that line, and there would not be any questions. Mr. Pelletier observed that it cost less even if a contractual worked more than 24 hours a week, because there were no benefits for contractual employees and their hours can be increased or decreased as needed. Over a period of time, over different people, he explained, it is a way of saving money. When asked if it was a way to bypass the collective agreement (contourner la convention collective) he said not at all - it was a way to cut costs with the budget restraints.

41. Ms. Waito made a number of allegations about fraudulent contracts. Although there were a number of Ms. Waito's contracts that were corrected retroactively, and a lack of precision about how they were filled out and when they were signed, in relation to when they started, there is nothing about the form of the contracts themselves that suggests a breach of the CCBA. Time slips are what actually

determines what a person gets paid. There is no evidence that Ms. Waito was ever not paid for time worked, even during the period where her contract shows her as in a position working less than 24 hours per week at a time when she was working 35 hours a week. The evidence is clear, as well, that although there was some confusion over the lists of contractual people given to the union, that the union had seen Ms. Waito's name as working more than 35 hours on at least one occasion, and both Ms. Gravel and Ms. Stang were aware that she was working regularly in the bookstore.

42. Mr. St. Jules, the Vice-President to whom Mr. Pelletier reports, signed the letter informing Ms. Waito that her contract would not be renewed. He did not testify. Mr. Pelletier testified that he was not aware Ms. Waito was going to be fired on June 1, although he had discussed the situation between Ms. Aaltonen and Ms. Waito with Mr. St. Jules on May 30. Mr. Pelletier was not privy to the reasons for the termination. However, he had earlier discussed Ms. Waito's workload with Ms. Aaltonen, when Ms. Waito had complained to him. On this occasion, Ms. Aaltonen had expressed the view that if things did not change at Ms. Waito's level in regards to her ability to handle the computerized work, that the College should look at not renewing. At the time, Mr. Pelletier proposed a training program for Ms. Waito, a review of her tasks and that work should be done on communication between Ms. Waito and Ms. Aaltonen. During the hearing Ms. Waito asked Ms. Aaltonen why she was fired. Ms. Aaltonen referred to the letter from Mr. St. Jules and said she could not answer for senior management. She then went on to refer to Ms. Waito's computer problems, but did not indicate they were the reasons Mr. St. Jules let Ms. Waito go.

Arguments and conclusions

I. The allegations against the union

43. The union is alleged to have breached sections 67 and 76 of the CCBA, which provide as follows:

67. The bargaining units set out in the Schedules are the units for collective bargaining purposes under this Act.

76. An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

44. Ms. Waito's complaint about the union is that they did not represent her. Examples given were that she was never given a collective agreement, Ms. Gravel told her after her firing that she had no union rights, and that she had to get her own lawyer. Further, she alleges the union (together with the college) was responsible for her being outside of the time limit with the second grievance.

45. Union counsel submits that there is no evidence of behaviour that is arbitrary, discriminatory or in bad faith, and therefore, no breach of the law. She argues that in trying to clarify the situation of the contractual employees, starting in 1993, Ms. Gravel well and truly represented her members. Further, the union tried to help Ms. Waito, even though she did not consider herself a part of the collective agreement either, filing grievances about the positions, and taking her grievance to arbitration. Counsel underlined that it is not for the Board to decide if it was the decision it would have made, but whether it was a breach of the law. Even if it was a case of bad judgment, submits counsel, it does not constitute a breach of the law.

46. Union counsel notes that the union tried to resolve the contractual issues according to the positions, not according to the individuals. This was a means to protect the bargaining unit and the collective agreement's requirement that positions be posted. It had the right to take these factors into account, on behalf of both its members and its potential members. It is argued that this was a reasonable

approach, taking into account all the elements of the situation. If, years later, it is determined that this was not the best strategy, or a miscalculation, it is not a breach of the law, submits counsel.

47. Union counsel notes that the burden of proof is on Ms. Waito and refers to the voluminous jurisprudence on the duty of fair representation including *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519, *Walter Princesdomu*, [1975] OLRB Rep. May 444, *ITE Industries Limited*, [1980] OLRB Rep. July 1001, *Savage Shoes*, [1983] OLRB Rep. Dec. 2067, and *Leila Yateman*, [1993] OLRB Rep. Aug. 777.

48. Applying the principles set out in those cases, union counsel submits that it is important that Ms. Waito never complained to the union between 1991 and 1993 and apparently indicated to Ms. Aaltonen that she was fed up with the union. Furthermore, despite her inexperience, Ms. Gravel went to see Ms. Waito. It is because of Ms. Gravel's persistence that the union learned of Ms. Waito's allegations of denial of breaks, harassment, and repetitive contracts. Against the background of a relatively young college, and the start-up problems with contractual positions, Ms. Gravel was looking to collect enough evidence to get the positions into the bargaining unit, and that took time. She was also balancing the potential effect of a grievance on Ms. Waito's renewal of contract. Union counsel underlines that Ms. Gravel did her best, taking action on Ms. Waito's concerns despite the fact that neither of them considered her a member of the bargaining unit at the time.

49. As to the settlement of the grievance, counsel observes that the jurisprudence is clear that a union has the right to make an agreement to settle a grievance. And the main part of the grievance was granted, the right to have a union position.

50. As to Ms. Waito's complaint that she was not given a collective agreement, counsel underlines that it was not the union's obligation to give her a collective agreement, and she was considered contractual during her employment.

51. Union counsel submits that the question is: what else should the union have done? The union can not act unilaterally, and Ms. Waito had not communicated with them before the fall of 1993. As well, it is the union's position that she did not communicate with the union about her firing or give any instructions to file a grievance during the time lines required by the collective agreement. The Board is urged to conclude that the union representatives acted in good faith, without discrimination or arbitrariness.

* * *

52. The standard applied under the CCBA is the same as that applied under the *Labour Relations Act, 1995*. That is, a union is not guilty of a breach of the duty of fair representation if it acts honestly, with due regard for the facts of the case and without discrimination. Mistakes or simple negligence are not sufficient to constitute a breach. However, the union is required to turn its mind to the situation and give honest consideration to relevant facts.

53. The facts in relation to the conduct of the union are as follows. The union was aware of Ms. Waito's situation as early as the fall of 1993, and had taken steps to clarify the situation. Nothing definitive was done until May 31, 1994 when a grievance in regards to the position, but without any relief claimed for Ms. Waito, was filed. This was consistent with the union's approach which focused on positions and not individuals.

54. I have found as a fact that when Ms. Waito was terminated, she was told by Ms. Gravel there was nothing she could do. There was then a period of approximately three months before Ms. Waito approached the union again in the person of Mr. Stead in Ottawa. In the meantime, the union

settled the May 31 grievance as the employer agreed to create a permanent position in the following year's budget.

55. Although the evidence is conflicting about whether Mr. Stead had agreed to call Ms. Waito back and did not, or whether he referred Ms. Waito to Ms. Gravel, I have found that nothing turns on this particular conflict in the evidence. That is because even if Mr. Stead had immediately responded to Ms. Waito's desire for assistance, the time lines in the collective agreement were long past, and the grievance of May 31 had already been settled. Further, Ms. Waito contacted Mr. Sauer shortly afterwards.

56. Given that the CCBA does not bestow the authority to extend time lines on arbitrators, the result of the arbitration of the late grievance was not surprising. And there is nothing before me which would suggest there was any breach of the CCBA in how the arbitration was handled by the union. The arbitration decision does not set out the basis on which the conclusion that the delay was not the union's fault and conflicting views were expressed in argument as to whether I was precluded from coming to an opposite conclusion. However, in the end it is not necessary to deal with that issue. The problem, if there is one, was in the earlier stance of the union: that Ms. Waito was not a member of the bargaining unit, and that nothing could be done for her. Evaluating that stance is the basic task before me, to which I now turn.

57. The CCBA provides a clear basis for Ms. Waito to have been entitled to representation by OPSEU. "Employee" is defined under the CCBA as follows:

"employee" means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2; ("employée")

The support staff bargaining unit referred to in that definition is as follows:

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) persons regularly employed for not more than twenty-four hours a week,
- (vii) students employed in a co-operative educational training program undertaken with a school, college or university,
- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement,

- (ix) a person engaged for a project of a non-recurring kind.
- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practice in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario.

The recognition clause in the collective agreement provides as follows:

1. Recognition
 1.1 Exclusive bargaining agent
 The union is recognized as the exclusive bargaining agent for all support staff, employees of the Colleges, save and except

- foremen and supervisors;
- persons over the rank of foreman or supervisor;
- employees performing duties that require the use of confidential information relating to employee relations and the formulation of the College budget or the Campus budget as the case may be;
- persons regularly employed for 24 hours per week or less and persons employed temporarily during the College vacation periods;
- students employed on a cooperative educational training program with a school, college or university;
- graduates of the College employed for up to 12 months following completion of their courses and associated with certification, registration or other licensing requirements;
- persons hired for a project of a non-recurring kind.

Any differences in the wording of the two descriptions of the bargaining unit have no significance for this decision.

58. Section 52 of the CCBA provides as follows:

52. Every agreement shall be deemed to provide that the employee organization that is a party thereto is recognized as the exclusive bargaining agent for the bargaining unit to which the agreement applies.

59. Section 67 provides that the bargaining units set out in the statute are the bargaining units for collective bargaining:

67. The bargaining units set out in the Schedules are the units for collective bargaining purposes under this Act.

60. Read together these statutory provisions give OPSEU the right and obligation to represent employees in the described bargaining units, and employees in those bargaining units the right to be so represented.

61. The basis for both the union's and management's position in this matter is that Ms. Waito was not in the bargaining unit until her position was approved as a permanent one. Given the statutory language, I do not find this to be the correct starting point. Rather, one must start with the categories used by the statute - the duties and number of hours regularly worked.

62. The effect of the above statutory provisions, is that people working the number of hours at the kind of tasks that Ms. Waito did for three years are in the bargaining unit, and represented by OPSEU, by force of law. None of the listed exceptions apply to the facts of this case. The College acknowledged at the hearing that her work was not an exceptional or non-recurring project. The union did not suggest otherwise. Employer counsel argued, as will be set out in more detail below, that the

parties were free to treat positions as not in the bargaining unit, and did so out of bona fide operational concerns in the start-up phase of the College. That proposition may be valid in a situation where the parties are free to determine the scope of the bargaining unit between them. However, I am not persuaded that it has any validity where the statute prescribes the bargaining unit. It is trite law that the parties cannot contract out of a statute. The statute, not the parties' consent, gives rights to individual employees to be in the bargaining unit and to be represented by a bargaining agent, as well as to the union to represent those employees.

63. There is no evidence that union representatives ever turned their mind to the statutory provisions which define the bargaining unit. Rather, the evidence is that the union representatives involved made inquiries of the employer, but in the context of its acceptance that positions were or were not in the bargaining unit depending on whether they had been deemed permanent by the employer. Consistent with this was its view of its inquiries about Ms. Waito's position as a kind of gratuitous service to a fellow employee who was not in the bargaining unit.

64. Do the above facts constitute a breach of the CCBA? Were the union representatives acting arbitrarily, discriminatorily, or in bad faith? In *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, the Board had this to say about the above terms at para. 36:

... "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

and at para. 39:

The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary, if before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in order to make that decision: *Canadian Union of Public Employees Local 2327*, [1982] OLRB Rep. June 623; *Swing Stage Ltd. re Alvin Plummer*, [1982] OLRB Rep. Nov. 1920.

65. Having carefully considered the matter, it is clear to me that nothing in the union's behaviour manifests bad faith. Having observed Ms. Gravel and Ms. Stang give evidence, there is no doubt in my mind concerning their good faith in the efforts they made to inquire about Ms. Waito's position. The evidence is clear that Ms. Gravel was new to her duties, and she was conscientiously going about trying to master the situation at hand. Similarly, Ms. Stang was honestly working on the problems regarding the list of contractual employees, albeit without immediate success.

66. As to discrimination, Ms. Waito did not suggest that there was any discrimination against her by the union, and acknowledged that Ms. Gravel did try to help her. Her allegations of discrimination were directed towards her treatment by her supervisor and management and will be dealt with below. Moreover, there is no evidence at all that the union discriminated against Ms. Waito personally. She was treated in the same manner as other contractual employees. Whether or not the union discriminated against the group of contractual employees is not something that was argued, and given my conclusion on the question of arbitrariness, which follows, is not necessary to determine.

67. As to arbitrariness, the case is somewhat more complex. This is not a case where the union thoughtlessly ignored the situation. Ms. Gravel, for instance, did not exhibit a "non-caring attitude", one of the indicators of arbitrary behaviour used in the Board's jurisprudence. Ms. Gravel listened to Ms. Waito's concerns and thought them serious enough to warrant a grievance. However, this was all

based on what I find to be an erroneous premise: that Ms. Waito was not entitled to representation. It is my view of the statutory provisions above that Ms. Waito was a person in the bargaining unit to whom the union owed a duty of representation.

68. The parties' practical approach to contractual positions cannot in my view diminish the fact that Ms. Waito had a statutory right to be represented by OPSEU, which was not recognized by them. In this context the fact that Ms. Gravel personally exhibited a caring attitude to Ms. Waito, and made efforts on her behalf, pales in comparison to the fact that the union as an institution is not likely to be carrying out a duty of fair representation that it does not acknowledge having.

69. The text of the May 31, 1994 grievance reflects the idea that the union was not actually representing Ms. Waito in filing the grievance, asking as it does for a declaration that her position is vacant and not asking any remedy for her at all. It reads as follows:

Union grievance under Article 18.3.3, pursuant to the collective agreement for support staff, Article 1.2 and 1.6, the position of bookstore clerk now occupied by a contract person (Murielle Waito) for over 3 years, should be filled full time, permanent. Further, this position is not a replacement position but a vacant position.

Settlement desired:

That the position in question be filled full time, permanent.

70. This grievance is premised on the acceptance of the idea that Ms. Waito was a contractual employee, and not a person in the bargaining unit. Given Ms. Gravel's short tenure as a steward, and the youth of the bargaining relationship, it is not surprising that the distinction between the rights of the individual to representation and the rights of the union to the position was not something considered by her at the time. Perhaps, it is a subtle distinction. However, it makes the difference between having access to representation by a bargaining agent and the whole set of rights in the collective agreement, as opposed to the rather tenuous rights of a contractual employee on repetitive fixed term contracts.

71. There is no evidence that either Ms. Gravel or Ms. Stang ever sought advice beyond speaking to each other and Human Resources about Ms. Waito's situation. In the end, there is no evidence that anyone in the union ever considered the possibility that Ms. Waito might be in the bargaining unit, despite the employer's designation of her as a contractual employee. There is no evidence that the description of the bargaining unit in either the statute, or the collective agreement, was reviewed in this regard. The wording of both descriptions is based on employees, their hours of work and duties, instead of the status of the parties' view of the desirability of having people in bargaining unit positions at any given point in time. In sum, it is my view that although the individuals involved acted in good faith, they were operating from a blindness to the legal basis of the definition of the bargaining unit and as to their duty of representation. I am not persuaded that this is compatible with the statutory duty. It is my view that the union acted arbitrarily in not considering the basic question as to whether Ms. Waito might already be in the bargaining unit. Put differently, this amounts to an inadequate investigation of her situation.

72. Further, it is my view that in providing the advice to Ms. Waito that there was nothing that could be done about her termination, the union completely failed to take into account Ms. Waito's personal rights. The union had already determined that Appendix D was NOT the correct characterization of Ms. Waito's position. If Appendix D was not right, and the union's view was that the position was a bargaining unit position, there was no basis put forward for the advice that nothing could be done for Ms. Waito. Even if she had been given the position in a matter that was not in compliance with the collective agreement, i.e. without a posting in the first place, that does not mean that it was a foregone

conclusion that she had no rights at all. And the problem is that there was no serious evaluation of the question of what her rights were. It was assumed that she had none.

73. In my view, nothing turns on the fact that Ms. Waito did not explicitly ask for a grievance to be filed about her termination. Of course, that would have been the better course, and the case would be clearer. However, the response that nothing could be done is consistent only with a request that something be done. In the circumstances of this case, this is sufficient to have alerted the union to the situation and required union representatives to turn their minds in a meaningful way to what rights Ms. Waito might have had.

74. The behaviour of the union over the summer of 1994 is consistent with the idea that it felt it owed no duty to Ms. Waito. It is not the settlement of the grievance that it filed that is the nub of the problem here. The union is entitled to settle a grievance, even an individual one, without the consent of a grievor. And the grievance it filed was a union grievance. So it was ever more entitled to settle without Ms. Waito's consent or participation in the negotiations. The problem lies in the fact that it treated Ms. Waito as totally irrelevant to the situation. In my view this represented a failure to turn its mind to the basic relevant facts of the situation.

75. This is not a case of a strategy towards the enforcement of the collective agreement with which the Board does not agree, or a judgment call about which reasonable people might differ. Rather it is one where I am persuaded that, having convinced itself that it had no duty to represent Ms. Waito, the union could not be fulfilling the duty of fair representation which I have found it owed Ms. Waito.

76. The intervention of Mr. Sauer, and the later filing of the grievance, were carried out in good faith, in my view. But it was too late to change the fact that the union had already conducted itself in a manner which did not acknowledge that it owed any duty to Ms. Waito.

77. In the result, it is my finding that the union has breached its duty of fair representation in the manner described above.

II. The case against the College

78. As against the College, Ms. Waito complains that there has been a breach of section 75(2), which reads as follows:

75. (2) The Council, an employer or any person acting on behalf of an employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;
- (b) impose any condition on an appointment or in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act;
- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act,

but no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed in a managerial or confidential capacity.

79. Ms. Waito argues that she was the victim of discrimination, which she defines as the denial of equal treatment or opportunity being subjected to unjust distinctions. Most basically, she alleges it

was discriminatory that she, and others working more than 35 hours were not allowed to be permanent employees. She bases her allegation on the existence of contracts at 24 hours when she was working 35 hours per week, the Appendix D classification when she was not replacing anyone and the fact that her name was sometimes omitted from the list of contractual employees working more than 24 hours a week. As well, she argues that there were prohibitions against speaking to the union and discriminatory changes in her job duties.

80. Ms. Waito also claims she was a victim of harassment and abuse of power. She alleges that Vice-President Yves St. Jules and Anita Aaltonen deliberately tried to make her life unbearable to force her to quit.

81. Counsel for the College argues that there was no intentional unfairness to Ms. Waito. Further, it is submitted that there is no evidence of harassment, and if there was any, it had nothing to do with union rights.

82. Counsel underlines that there is no reverse onus in the CCBA, as there is in the *Labour Relations Act, 1995*. Further, counsel submits that Ms. Waito never exercised a right under the law, until well after her termination, and never engaged in union activities.

83. Employer counsel refers to the parties' focus on positions instead of individuals, and submits that this was a joint, good faith historical practice between the parties, well founded in operational considerations during the formation of the collective bargaining relationship at the new college. These were years of budgetary uncertainty as well. There was no targeting of Ms. Waito, submits counsel. Rather, the College targeted positions for budgetary reasons and had the implicit agreement of the union.

84. Employer counsel submits that the parties to the collective agreement had the right to concentrate on positions and not individuals. He submits that the first and most important question relates to his contention that they had the right to determine the time at which a person would enter the bargaining unit. As will be elaborated further below, in the face of a statutory bargaining unit, this argument cannot be accepted.

85. The College's position is that the statute is transposed into the contract and the collective agreement becomes the instrument which governs the relationship between the parties. That position is uncontroversial, in my view, up to the point where the collective agreement or its interpretation comes into conflict with the statute. Then, it is the statute that prevails, as made explicit in section 48(2) of the CCBA which provides as follows:

48(2) Where a conflict appears between any provision of an agreement and any provision of any legislation, the provision of the legislation prevails.

86. Employer counsel submits in this respect that it is important to consider what terms are *not* defined in the statute. Observing that the word "regularly" (as in regularly employed for not more than twenty-four hours) does not have a statutory definition, counsel submits it is left to the parties to determine what that means, and that these parties had a settled practice in that regard. The Board is urged to find that there was nothing illegal in the conduct of the parties in relation to Ms. Waito, or other employees in a similar situation. Counsel maintains that the two parties to the collective agreement simply found it in their mutual interest to act as they did. Mr. Pelletier cited budgetary reasons for the practice, and the union did not see fit to grieve before May 31, 1994. Mr. Pelletier explained these were difficult economic times, they wanted to regularize positions as they could, and it was not to get around the collective agreement. Mr. Pelletier said it was important to have a certain stability in the positions.

Moreover, the union was well aware of the precarious budgetary situation, as reflected in the settlement they signed in the summer of 1994 creating the position in the next budget year.

87. Counsel submits that there is no room for finding an anti-union motive in this case. No one was trying to exclude Ms. Waito because of anti-union motives. The intention was to include people, but at the moment judged opportune by the parties. The employer contends that the practice was sanctioned by the union; the president of the local obtained her position by the same practice. Counsel submits that this matter must be judged, not with the wisdom of hindsight, but the prevailing wisdom of 1994, and the fashion in which the parties had decided to govern themselves.

88. There is insufficient proof of the constitutive elements of a violation of the law, according to employer counsel. Rather there is evidence that Ms. Waito had a mistaken belief, nourished by her isolation and a lack of understanding of the wider picture.

89. Counsel maintains there is no proof that there was a refusal to continue to employ Ms. Waito because she exercised a right under the law, or because she was or wasn't a union member. Since she did not consider herself a member of the bargaining unit, how could she have been exercising a right under the CCBA, queries counsel.

90. In any event, argues counsel, she had exercised no such right prior to May 31, the last day of her contract, and did not then have the rights of a member of the bargaining unit. In this regard, employer counsel refers to the letter written by Ms. Waito's lawyer, which she approved after she had told him all the facts. It cites nothing to do with an attempt to be unionized or to exercise her rights under the statute. Counsel maintains that this is a reflection of the true state of affairs: Ms. Waito was complaining of an intolerable situation with her supervisor, not an attempt to get a union job. Her written material says it concisely, "I never thought reporting harassment would get me fired."

91. The College refers to the basic fact that there was no contract of employment after May 31. Further, counsel observes that the complainant's witnesses, Ms. Aaltonen and Mr. Pelletier testified that they were not involved in the termination, and there is no contrary proof. Counsel stated that it seems that they did not try to renew the contract because the environment seemed unhealthy, and an investigation was going to commence. And then her lawyer said she would refuse to meet Mr. St. Jules to discuss her letter. So, there was an inability or unwillingness to participate in the process which was going to get to the bottom of it. But there is no proof, in counsel's view, to form a causal link between her termination and union activity.

92. Counsel observes that the fact that the college invited the vice-president of the union to sit on the investigation committee seems more an indication of the comfort zone between the parties, rather than an attempt to hide a non-union employee.

93. Counsel queries: If the college really had it in for Ms. Waito, why would the college have claimed her position in the budgetary process in 1993 and 1994, when they could have created positions elsewhere.

94. As to Appendix D, counsel submits that there is no evidence that the College used it to exclude Ms. Waito from anything. The evidence is that Ms. Grondin went to another position, and the College filled her position using Appendix D, perhaps in error.

95. As to Ms. Aaltonen, counsel submits that there is no evidence that she did anything because of Ms. Waito's exercise of any rights, nor any evidence of any threat of termination, financial penalty, or anything else. Further, there is no evidence that anyone ever stopped Ms. Waito from speaking to anyone. Even if Mr. Pelletier said he was aware of intimidation, it had nothing to do with unionization.

Further, counsel notes that the College could have terminated the contract whenever they wanted, but they did not. In fact, the contract was renewed a number of times after she had participated in a workshop about unions in May, 1993, as well as after the fall of 1993 when Ms. Waito started talking to Ms. Gravel.

96. College counsel submitted a jurisprudence brief, all of which has been carefully reviewed and which will be referred to as necessary below.

97. Turning then to the question before me: Did the College breach section 75(2) of the CCBA, set out above?

98. Employer counsel's brief of jurisprudence includes *Seneca College of Applied Arts and Technology*, [1990] OLRB Rep. June 739, in which the Board's approach to this section is accurately set out as follows:

9. We have already noted that the CCBA does not contain a reverse onus provision with respect to complaints that a person has been refused employment, discharge, discriminated against, or otherwise dealt with contrary to it in relation to his/her employment. Accordingly, in this case, the complainants must satisfy the Board, on a balance of probabilities, that there was an improper motive for the respondent's treatment of Charbon. The nature of complaints like this one is such that the Board must usually draw its conclusions from inferences which can fairly be drawn from the objective evidence. If the Board is satisfied that any part of the motivation for a respondent's conduct was contrary to the CCBA, the complaint will succeed. In making its determinations in that respect, the Board will consider the objective reasonableness of the actions of the respondent which are impugned by the complaint and the existence of any unusual or "peculiar" conduct of the respondent (the Board's reasoning in, among others, *John T. Hepburn, Limited*, [1985] OLRB Rep. Jan. 75; *Manor Cleaners Ltd.*, [1982] OLRB Rep. Dec. 1848; *Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35; *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 is equally apposite to case like this one, even though those cases dealt with complaints under the *Labour Relations Act*). This case is not about just cause. Rather, they must establish that the respondent's actions were not *bona fide* in the sense that some part of the respondent's motivation therefore was improper, namely, in breach of section 80(1) of the CCBA.

The state of the Board's jurisprudence directly before the reverse onus was put into the *Labour Relations Act*, i.e. when it was in the same state as the CCBA still is, was set out in *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450 by the then Chair of the Board Armstrong to the effect that a breach of the Act occurs not only when illegal motivation is the primary or only reasons for an action but also when it is a contributing factor. Further, the Board underlined that heavy reliance must often be placed on circumstantial evidence. The Board then referred to *National Automatic Vending*, 2 CLLC 1960-1964 ¶16,228 which details the Board's approach to onus of proof and inference in the absence of the reverse onus as follows:

...The fact that the primary onus for establishing the merits of the complaint lies on the complainant, does not, of course, mean that the complainant is bound to demonstrate by direct evidence each and every fact or conclusion of fact upon which the issue in dispute depends. Reasonable and necessary inferences may and must be drawn from all the evidence adduced and that which is clearly inferable from the evidence is as much proved as if it had been established by direct evidence.

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It is not without some interest to note the following statements concerning the quantum of proof required by the Courts where the facts of an issue to be proved lie peculiarly within the knowledge or means of knowledge of the opposite party:-

... In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved, which may be possessed by the parties respectively *Cummings v. Vancouver* (1911) 1 W.W.R. 31 per Irving, J.A.

at p. 34, quoting from Stephen's Digest of the Laws of Evidence, 9th ed. art. 96 (affd. 46 S.C.R. 457; see also, *Windsor Board of Education v. Ford Motor Co. of Canada Ltd.* [1939] S.C.R. 413, per Davies, J. dissenting at p. 423, [1941] A.C. 453, per Lord Atkin at p. 461; *R. v. Kakelo*, [1923], 2 K.B. at p. 795; *Phipson on Evidence*, 9th ed. p. 41.)

... where the facts lie peculiarly within the knowledge of one of the parties, very slight evidence may be sufficient to discharge the burden of proof resting on the opposite party - *Taylor on Evidence*, 12th ed. vol. 1, pp. 262-263; (see also *Pleet v. Canadian Northern Quebec R.W. Co.*, (1921) 50 O.L.R. 223).

A rule of evidence will be found stated in the text books in the following words: "Where the subject matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour - -. This rule has been modified by later authorities. In *Phipson on Evidence*, p. 27, it is said that: "In the absence of statutory provisions, the better opinion now seems to be that, in general, some prima facie evidence must be given by the complainant in order to cast a burden upon his adversary. The difficulty of proving a fact peculiarly known to an opponent may, it has been said, affect the quantum of evidence demanded in the first instance but does not change the rule of law".

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In order to shift the burden of justification to the employer in an action by a former employee against an employer at common law for damages for wrongful dismissal, the plaintiff employee need prove only (1) the contract of hiring, (2) the fact of his discharge, and (3) his damages. When he does this, an onus then shifts to the defendant employer to establish that proper cause existed for the dismissal. (See *George Ditchfield v. Gibson Manufacturing Company Ltd.* CCH Canadian Labour Law Reporter, vol. 1, ¶15,362, *McInnes v. Ferguson*, (1899) 32 N.S.R. 516; *Butler v. C.N.R.* [1940] 1 D.L.R. 256.)

Needless to say, however, we do not for a moment suggest, in proceedings under section 65, that unless there is evidence to the contrary, discrimination may be found against an employer upon what amounts to mere proof of a contract of hiring and dismissal. A complainant may, however, by proving the contract of hiring, the dismissal, and certain other objective facts and circumstances, short of direct evidence of discrimination, cast such an onus of credible explanation on the employer, who alone may know or have the means of knowledge of the actual reasons for the dismissal, that if such an explanation is not given, an inference may readily be drawn that the treatment accorded the employee was discriminatory and contrary to the Act. That it is often only the employer who has the knowledge or means of knowledge of the actual reasons for the discharge is, of course, only one factor or circumstance which the Board may take into account in assessing the evidence as a whole and deciding what weight to give to it. It plainly cannot relieve the complainant of the primary burden of proof to satisfy the Board by credible evidence that the action taken by the employer was discriminatory and contrary to the Act.

99. Turning to components of section 75(2), the first subsection, 75(2)(a), prohibits refusal to employ, or discrimination against a person because of the exercise of rights under the CCBA. Ms. Waito's complaint encompasses this subsection to the extent that it suggests that she was harassed and then terminated because she exercised rights under the CCBA, specifically, because she spoke to the union, and had a grievance filed.

100. Does the evidence support the proposition that the non-renewal was in response to an exercise of rights under the CCBA? As noted, the employer maintains Ms. Waito was not exercising any rights under the CCBA. The evidence involves a number of events which are potentially properly considered as the exercise of rights under the CCBA, including talking to the union steward, the resulting filing of a grievance and the filing of the letter of complaint about the supervisor.

101. To start with the conversations with the steward, it is my view that Ms. Waito was exercising the rights afforded by the CCBA in attempting to get the union to take action about what she considered

her intolerable situation at work. It was suggested in argument that because neither she nor anyone else considered her part of the bargaining unit at the time, Ms. Waito could not have been exercising rights under the CCBA. This cannot be the law in my view. Otherwise, the beliefs of the parties, regardless of their accuracy, would determine the meaning of statutory rights. I have set out my view of the statutory bargaining unit above. Once the statute grants membership in that bargaining unit, I find that seeking the assistance of the bargaining agent is part of exercising the right to be a member of the bargaining unit. Further it is participation in the lawful activities of an employee organization, which is protected by section 65 of the CCBA, which provides as follows:

REPRESENTATION RIGHTS

65. Every person is free to join an employee organization of his or her own choice and to participate in its lawful activities.

102. As to the filing of the grievance itself, this was not an act Ms. Waito took herself, and thus I do not technically find it an exercise of a CCBA right by her. However, even though I have found that the union was not seeking to protect Ms. Waito's right in filing the grievance, there is arbitral authority to the effect that a union grievance might have been the only way to achieve recognition of her bargaining unit rights in any event. (See for example the arbitral jurisprudence in respect of the union's right to grieve the Colleges' approach to the use of sessionals, who have no right to grieve themselves in *Lambton College and OPSEU Local 125* and *Cambrian College and OPSEU*, unreported decisions of Howard Brown dated August 28, 1989 and July 25, 1997, respectively). This tends to diminish the utility of the distinction between Ms. Waito's exercise of rights and the union's in regards to such a grievance in any event. Regardless of how one views the filing of the grievance though, the sequence in which Ms. Waito sought the intervention of the union in the spring of 1994 qualifies as the exercise of a right under the CCBA in my view.

103. As to the letter of complaint, it qualifies as the exercise of union rights only if one considers it a grievance. However, it nowhere mentions the collective agreement, or the CCBA, although it does mention the possibility of a complaint to the Human Rights Commission. In the circumstances I have concluded that the letter of complaint is not properly viewed as a grievance or as a grievance or as an exercise of union rights.

104. The non-renewal of Ms. Waito's contract followed immediately upon the grievance which resulted from her seeking the union's intervention, (and the letter of complaint). Thus, there is a temporal connection between the non-renewal and the exercise of what I have found to be a right under the CCBA, seeking the intervention of the union. Prior to this juncture, Mr. Waito had had her contract renewed at least thirteen times. (The number can be considered larger if one counts corrected and overlapping contracts). Thus, the question naturally arises as to why the contract was not renewed this time, particularly as Mr. Pelletier testified that he had informed the bookstore staff earlier in May that contractual staff would have their contracts extended until June 30 and the Human Resources department had announced by its earlier memo that Mr. Waito was on an Appendix D contract running from October, 1993 to June 30, 1994. Mr. Pelletier testified as Ms. Waito's witness. Although he was in charge of the bookstore, he testified credibly that he did not know what the reasons for the non-renewal were. Nor did Ms. Aaltonen, Ms. Waito's immediate supervisor, indicate that she knew what they were, saying instead that she could not answer for senior management.

105. Mr. St. Jules, who did not give evidence, signed the termination letter, which does not give reasons for the non-renewal. No evidence was called by the employer as to the reasons, and thus there is no direct evidence about the actual motives for the non-renewal. Although the evidence provides other potential reasons for the non-renewal such as the ongoing difficulties concerning computer skills, and the letter of complaint about Ms. Aaltonen, neither Mr. Pelletier nor Ms. Aaltonen said that was the

case. Given their positions, and previous conversations with Mr. St. Jules, it seems peculiar that they would not know if those were the reasons.

106. As I have indicated above, I was not persuaded by the evidence that the difficulties between Ms. Waito and Ms. Aaltonen had anything to do with the union, her conversations with the union steward, or the intervention made by Ms. Gravel about breaks. Thus, the evidence does not form the basis for a finding that Ms. Aaltonen's attitude to Ms. Waito's computer skills was a cover for anti-union animus. However, she did not decide on the non-renewal.

107. The question then becomes whether the evidence is sufficient to shift the onus to the employer to explain that which is peculiarly within its knowledge, i.e. the actual, rather than potential, reasons for the non-renewal.

108. As the excerpts from the jurisprudence set out above suggest, in the absence of the reverse onus of proof, the onus will shift when there is sufficient evidence to call for a credible explanation from the person in whose knowledge the actual facts lie. The evidence is sufficient in my view to call for such an explanation. For example, the evidence of the temporal connection between Ms. Waito's seeking the intervention of the union and her abrupt non-renewal laid against the background of repeated renewals, even though the difficulties about computer skills had been going on for months, and after Mr. Pelletier had announced an extension to June 30 which was never acted on, suggests that her seeking the union's assistance may have been a factor. The evidence of this departure from the previous routine, as well as the fact that it was contrary to Human Resources' declaration that her Appendix D status would last until June 30 is the kind of unusual or peculiar conduct of the employer, referred to in the above jurisprudence, which calls for a credible explanation of the employer's motivation for the non-renewal. The evidence about the process for obtaining permanent positions made it clear that if the union grievance were successful and Ms. Waito's position were declared vacant, she would likely have applied. Although it is uncertain whether she would have been successful, given her conflicts with her supervisor, it was certainly a possibility since she had done the jobs for over three years. It is possible that this was also an eventuality which the employer wished to head off by not renewing her contract. Since this possibility was directly related to Ms. Waito's seeking the intervention of the union, it adds to the evidence which calls for an explanation.

109. A related approach to the absence of evidence from Mr. St. Jules is to ask whether there is reason to draw an adverse inference from his failure to testify. The failure to call a witness to give material evidence permits the Board to draw the inference that the unproduced evidence would be either contrary to, or not supportive of, that party's case. (See, Sack & Mitchell, *Ontario Labour Relations Board Practice and Procedure*, and the cases cited at para. 1.145). Without the evidence of Mr. St. Jules', it is not possible to know which of the possible reasons were the actual reasons for the non-renewal. Acting in reaction to either Ms. Waito's seeking the intervention of the union or to her seeking a union position through a grievance is illegal motivation. The circumstances above make it likely that one of these factors was present to the mind of the employer in deciding not to renew, and the lack of evidence leads to the adverse inference that it did play a part.

110. Having considered the above aspects of the matter, separately and together, I have concluded that the College infringed subsection 75(2)(a) in the non-renewal of Ms. Waito's contract after May 31, 1994.

111. Turning then to subsection 75(2)(b). This subsection focuses on employer behaviour that may seek to prevent an employee from exercising rights under the CCBA, rather than behaviour that is a reaction to the exercise of rights as is the case for subsection 75(2)(a). The relevant evidence in regards to this subsection is the evidence on the College's motivation for imposing the condition of a

contractual employee on Ms. Waito, rather than treating her as a member of the bargaining unit and or imposing the condition of an expiry date of May 30, rather than June 30 as announced by Mr. Pelletier.

112. To save money, the College made use of contractual positions even for employees who worked more than 24 hours a week performing functions that are not argued to be outside either the collective agreement's or the statute's description of the bargaining unit except to the extent that employer counsel says the parties had an implicit agreement about the meaning of "regularly employed", an argument dealt with below. In the instance of Ms. Waito's job in particular, the College deferred the creation of a permanent bookbuyer position for almost three years beyond the time bookbuying duties took more than 24 hours a week. Even the two-time approval of the position in the budget did not result in a posting.

113. The evidence from Mr. Pelletier supports the conclusion that the College quite consciously imposed on Ms. Waito the status of contractual employee for the years 1992 to 1994 with the explicit purpose of deferring the inclusion of the bookbuyer position in the bargaining unit. In doing so, it is my view that it imposed a condition in a contract of employment with a view to restraining her from exercising a right under the CCBA, i.e. the right to be represented by OPSEU in her terms and conditions of employment. That is a breach of subsection 75(2)(b) of the CCBA.

114. I am persuaded that in doing so, Mr. Pelletier had no anti-union animus in the sense of wishing to rid the College of the union. However, it was an explicit strategy to avoid applying the terms of the collective agreement, in particular its wage and benefit portions, to certain positions, until the College was prepared to assume those obligations unilaterally. It is necessarily inherent in this that the individuals working in contractual positions over the hours that would put them in the statutory bargaining unit would be restrained, if not totally prevented from, exercising their rights. Economical as this strategy may be, it runs contrary to the provisions of the CCBA, which provides a statutory bargaining unit. Although this may also be an issue which could be dealt with under the grievance procedure, this does not preclude its consideration under the statutory provisions.

115. I have carefully considered Mr. Champagne's argument to the effect that the evidence should be construed as the parties' mutual understanding of the term "regularly employed". No argument or precedent was aimed at showing that the commonly accepted meaning of "regularly employed for not more than 24 hours per week" would not apply to the situation in which Ms. Waito worked 35 hours per week for over three years. When it comes to interpreting a statute, it is the ordinary meaning which prevails unless there are reasons such as absurdity of result or conflict with public policy which suggest otherwise. No such impediments to the use of the ordinary meaning was suggested. Nor was it suggested that the union had actually explicitly agreed that "regularly employed" should be so construed under the collective agreement.

116. Even if the union were estopped from arguing that Ms. Waito's position or she herself ought not to be considered in the bargaining unit because of its conduct in not grieving, such an estoppel cannot operate to strip Ms. Waito of any rights under the CCBA. It is important to note that I do not find it necessary to decide if the facts would support such an estoppel, and I explicitly refrain from doing so. This is because whatever the parties may be free to agree on, or rely on estoppels for, where there is no statutory bargaining unit, I remain unpersuaded that such a route is open where there is a statutory bargaining unit. This is further supported by section 48(2) set out above, which explicitly sets out the primacy of the statute over any agreement.

117. It is the fact of the statutory bargaining unit which distinguishes this case from *Delphis W. Vandette*, [1988] OLRB Rep. Feb. 215 and *Ted Stothers*, [1990] OLRB Rep. March 347 where the parties had excluded certain employees from the bargaining unit.

118. Further, the evidence does not support the proposition that the union agreed that the bargaining unit was defined as including only those positions that the employer had determined were permanent ones. It supports instead the idea that the union was aware of the employer's practice, questioned it in several instances, and accepted that permanent positions were to be posted and filled by an interview process. This is not the same as an agreement to modify the most fundamental cornerstone of collective bargaining - the definition of the bargaining unit - to the effect that contractual employees could be excluded for an indefinite amount of time, regardless of their duties or hours of work.

119. The evidence of Mr. Pelletier that the contractual people would be extended until June 30 indicates that management had decided to keep Ms. Waito on contractual status for at least another month. The College's approach up to that point was to defer the creation of a bargaining unit position for as long as possible. Prolonging the contract further, until the end of June was not inconsistent with that approach. The decision not to act on that extension, but instead to decide to return to the May 31 date must be seen as very likely responding to an event which occurred between the announcement of the prolongation in mid-May and the decision not to renew, articulated in Mr. St. Jules' letter of June 1. The events noted above, the consultation with the steward which resulted in the grievance and the letter of complaint, are the notable intervening events. Mr. Pelletier's evidence supports the finding that delaying or avoiding entry into the bargaining unit was an active motivation in management decision making at the time. The bookstore position had been approved in the budget for the second time and the union had now grieved by the time Mr. St. Jules made the decision to revert to the May 31 expiry date. Other evidence supports the finding that Ms. Waito would have applied, and might have been successful. Employer counsel suggested that the decision was likely based on the fact that the situation had become unhealthy. But there is no evidence that this was actually the case, although it remains a possibility. It is, in the absence of evidence to negative this inference, more likely than not that preventing the position and/or Ms. Waito from becoming part of the bargaining unit, consistent with the approach testified to by Mr. Pelletier, was part of the motivation as well.

120. As to the allegations against Ms. Aaltonen personally, I have already said that I am not persuaded that her difficulties with Ms. Waito and her computer skills were a cover for anti-union animus. As to the allegations about the directives about union stewards, Ms. Waito's and Mr. Dolbec's evidence supported the idea that they had been requested to send union representatives to the office. Even in the absence of the evidence contradicting theirs from co-workers, and from Ms. Gravel who indicated this rule was never communicated to her, this evidence does not in my view amount to an imposition of a condition of employment for the purpose of restraining their exercise of CCBA rights. The evidence provides the basis for the finding that both Mr. Dolbec and Ms. Waito had formed the impression that conversations with the union at work were unwelcome, and it may be that Ms. Aaltonen made some statement about referring questions about contracts to her, but the evidence is not sufficiently persuasive to support the allegation made of a breach of the CCBA in this respect. Further, one notes that there are restrictions in the collective agreement itself about union activity during work time.

121. The above findings about Ms. Aaltonen's behaviour also deal with the portion of subsection 75(2)(c) which prohibits threats or intimidation aimed at restraining a person from exercising rights under the CCBA. I do not find that the complaint is made out in that respect. I have little doubt that Ms. Waito found Ms. Aaltonen intimidating. However, I remain unpersuaded that this had anything to do with the union or Ms. Waito's statutory rights. Thus I find that Ms. Aaltonen did not seek by intimidation, threats or any other means to keep Ms. Waito from exercising her rights under the CCBA.

* * *

122. To summarize then, I find that the complaint is made out to the extent indicated above. In the face of a bargaining unit prescribed by statute, both the union and the employer have breached the

CCBA, the union in failing to turn its mind to what rights Ms. Waito had personally, and the College in failing to renew her contract in response to her seeking the intervention of the union and in maintaining the bookbuyer position as contractual, at least in part in order to avoid Ms. Waito's being able to exercise her rights as a member of the bargaining unit, most specifically in respect of taking advantage of the superior conditions of employment afforded by the collective agreement.

What is the appropriate remedy?

123. Designing an appropriate remedy is intended to put the parties back in the position they would have been had the breach not occurred. Doing so in this case is quite a complex matter for a number of reasons. I have decided that it is appropriate to give the parties the opportunity, with the assistance of a labour relations officer, to resolve the matter of remedy themselves, as the evidence disclosed several factors which make it difficult to approach. These include the agreement that the bookbuyer position would not be permanent until 1995, the failed arbitration of the dismissal grievance, the bumping process which occurred after 1994, the contracting out of the management of the bookstore, as well as the shared responsibility of the parties for the situation. And the evidence did not deal with many of the details which would be necessary in order to tailor an appropriate remedy and to determine any questions of reasonable mitigation or foreseeability of the damages claimed by Ms. Waito.

124. The matter is referred to the Manager of Field Services to assign a Labour Relations Officer to contact the parties to offer them assistance in coming to a resolution on remedy. If no resolution is achieved within 30 days of this decision, or such extension of that time on which all parties agree, I will receive written submissions according to the following schedule:

- A. Ms. Waito is to write a concise specific account of what she claims as remedy, and how it flows from the facts and the law as I have found them in the above decision. Further, she is to indicate what evidence she has to justify that remedy. She is to forward that to the Board, and to union and employer counsel by September 10, 1998.
- B. By September 24, 1998, the union and the employer are to reply to the submissions made by Ms. Waito, in detail, including a concise statement of any evidence they would seek to call on the issue of remedy.
- C. By October 1, 1998, Ms. Waito is to reply in writing to the submissions of the other parties, indicating what portions she agrees with and what portions she disagrees with. For the latter category, she is to indicate her reasons for disagreement.

125. If the parties agree to any extension of the schedule for written submissions, that is acceptable to the Board, as long as such agreement is communicated to the Board in writing prior to the dates set out above.

126. The Board will review any submissions received and determine if an oral hearing is necessary.

127. I remain seized.

0809-98-R United Food and Commercial Workers International Union, Local 175, Applicant v. **Loeb Inc.**, Responding Party v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414, Intervenor

Certification - Collective Agreement - Ratification and Strike Vote - Termination - Timeliness - Voluntary Recognition - UFCW applying to represent bargaining unit of grocery store employees - USWA asserting existence of collective agreement with employer and that application untimely - Board not accepting USWA submission that its collective agreement with employer was but a continuation of a collective bargaining relationship at another location of the employer and that section 66 of the Act should not therefore apply - Board not satisfied that USWA ratification vote or any of the other circumstances establishing that USWA was entitled to represent employees at the store at the time the agreement was made - Board terminating USWA's bargaining rights under section 66 of the Act, finding UFCW's certification application timely, and referring matter to Manager of Field Services for purposes of determining vote arrangements

BEFORE: *D. L. Gee*, Vice-Chair.

APPEARANCES: *A. M. Minsky* and *Wayne Hanley* for the applicant; *Richard Anstruther*, *Bob Auger* and *Don Erskine* for the responding party; *Paul J. J. Cavalluzzo* for the intervenor.

DECISION OF THE BOARD; August 10, 1998

1. The style of cause is hereby amended to refer to the responding party as "Loeb Inc."
2. This is an application for certification filed on behalf of the United Food and Commercial Workers International Union, Local 175 (the "UFCW") for a unit of employees working for Loeb Inc. at its store located at 4048 Carling Avenue in Kanata, Ontario. In response to the application, submissions were filed on behalf of Loeb Inc. and Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (the "USWA") in which it is asserted that Loeb Inc. and the USWA are party to a collective agreement covering the employees affected by the application. The UFCW challenged the validity of the collective agreement between Loeb Inc. and the USWA on the basis of sections 44 and 66 of the *Labour Relations Act, 1995* (the "Act"). By decision dated June 8, 1998, the Board (differently constituted) declined to direct a vote pending a Board determination as to whether the application is timely. A hearing was held on July 2, 1998 for such purpose.

Relevant Statutory Provisions

3. Sections 44 and 66 of the Act provide as follows:

44. (1) A proposed collective agreement that is entered into or memorandum of settlement that is concluded on or after the day on which this section comes into force has no effect until it is ratified as described in subsection (3).

(2) Subsection (1) does not apply with respect to a collective agreement,

- (a) imposed by order of the Board or settled by arbitration;
- (b) that reflects an offer accepted by a vote held under section 41 or subsection 42(1); or
- (c) that applies to employees in the construction industry.

(3) A proposed collective agreement or memorandum of settlement is ratified if a vote is taken in accordance with subsections 79(7) to (9) and more than 50 per cent of those voting vote in favour of ratifying the agreement or memorandum.

66. (1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 18 (3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

Facts

4. This matter was argued on the basis of an Agreed Statement of Facts which states as follows:

UFCW Local 175 v. Loeb Inc. (USWA Intervenor)

OLRB file 0809-98-R

Agreed statement of facts

Background

- 1) The Respondent operated a grocery store, known as Loeb Beaverbrook ("Beaverbrook") located at 2 Beaverbrook Road in the City of Kanata, Ontario. Beaverbrook ceased operations at the close of business February 14, 1998.
- 2) The Respondent currently operates a grocery store known as Loeb March Road at 4048 Carling Avenue (the corner of Carling Avenue and March Road) in the City of Kanata, Ontario. The March Road store is approximately one mile from the location of the Beaverbrook store. The March Road store officially opened the day following the closure of Beaverbrook, i.e. February 15, 1998.
- 3) The Intervenor USWA held bargaining rights for employees of Beaverbrook in an "all employee" bargaining unit with standard exclusions.
- 4) The USWA acquired bargaining rights at Beaverbrook pursuant to an OLRB certificate dated December 30, 1991.
- 5) There was a collective agreement in effect at Beaverbrook between the USWA and the Respondent which expired December 31, 1997. This was the second such agreement negotiated by the USWA on behalf of the Beaverbrook employees since certification in 1991.

- 6) The second Beaverbrook collective agreement was originally concluded between the USWA and a franchisee who was the owner of the Beaverbrook store at that time.
- 7) During the life of the second collective agreement the Beaverbrook store reverted to corporate ownership, i.e. the ownership of the Respondent.
- 8) Prior to the events in this proceeding, the Respondent decided to close the Beaverbrook store and to open another grocery store, to be known as Loeb March Road, approximately one mile from the location of the Beaverbrook store. The March Road location allowed for greater square footage than was possible at Beaverbrook and, unlike Beaverbrook, the March Road location is accessible from a major highway.
- 9) The decision to close the Beaverbrook store and open the March Road store was known to the Respondent and the Intervenor by the time the Beaverbrook collective agreement expired December 31, 1997. The Respondent and the Intervenor therefore commenced negotiations for a collective agreement to cover the March Road store.
- 10) The Respondent and the Intervenor successfully concluded an agreement for the March Road store on February 13, 1998. Its status as a valid collective agreement is subject to the Board's ruling on the Applicant's challenge pursuant to sections 44 and 66 of the *Labour Relations Act, 1995*.
- 11) The March Road agreement recognizes the USWA as the bargaining agent for employees at the March Road store in an "all employee" unit with standard exclusions.
- 12) The March Road agreement erroneously describes the address of the March Road store as being 360 March Road as both the Respondent and the Intervenor were at that time under a misunderstanding as to the correct address of the store. In fact the correct address is 4048 Carling Avenue.
- 13) No "no board" report was issued between the expiry of the Beaverbrook agreement December 31, 1997 and the conclusion of the March Road agreement February 13, 1998.
- 14) In the last three months of the Beaverbrook store's operation, the store employed approximately 55 employees.
- 15) During the last few months of Beaverbrook's operation, signs in the store advised the public of the impending closure of the Beaverbrook store and the impending opening of the March Road store.

Staffing issues

- 16) The Respondent looked first to the employees of the Beaverbrook store to fill the staffing requirements of the March Road store. Only after making offers of employment at March Road to the Beaverbrook employees did the employer commence hiring from other sources.
- 17) The Respondent has produced 93 documented offers of employment in non-management positions at March Road. The Company made these offers prior to February 13, 1998 on the date indicated on the form. These offers are signed and dated by the individuals to whom the offer is made.
- 18) There are four additional forms, apart from the 93 which have been produced. These relate to individuals from the Beaverbrook store who accepted employment at March Road, but who later declined, or resigned or were terminated prior to February 13, 1998.
- 19) Two individuals employed in bargaining unit positions at Beaverbrook applied for and obtained excluded management positions at March Road. There are no forms for these individuals.
- 20) Of the 93 forms, 44 ("the Beaverbrook forms") are signed by individuals who were

employed at Loeb Beaverbrook and subject to the Beaverbrook collective agreement. Forty-nine forms were signed by individuals not employed at Beaverbrook ("the non-Beaverbrook forms").

- 21) Ten of the 44 Beaverbrook forms were signed by individuals who were in their probationary period under the Beaverbrook collective agreement as of February 13, 1998. None of these employees were members of the USWA.
- 22) Of these probationary employees, one Jeff Henry, was a full time employee. The remaining nine probationary employees were part time employees.
- 23) Jeff Henry received training in respect of his March Road position prior to February 13, 1998, for which he was paid, but resigned from Beaverbrook prior to February 13, 1998 and did not work at March Road.
- 23.1) Dues were checked off for all probationary employees at Beaverbrook pursuant to the collective agreement. By February 15, the official opening date, all 43 Beaverbrook employees and 49 non-Beaverbrook employees commenced their regular shifts at March Road.
- 24) One of the Beaverbrook forms is signed by Jennifer Joannis, who was offered, and accepted, a bargaining unit position at March Road but was promoted to management at approximately one week after the February 15, 1998 opening of the March Road store.
- 25) One of the Beaverbrook forms is signed by Mark Chisholm. Mr. Chisholm was employed at Beaverbrook, accepted a March Road position, was employed at March Road, but resigned from his March Road position approximately one week after the opening of the March Road store.
- 26) Four of the 49 non-Beaverbrook forms are signed by individuals who came to March Road from other Loeb stores.
- 27) One of these four individuals is Wayne Owens. Mr. Owens came to Loeb March Road from a bargaining unit position at Loeb Convent Glen, a store at which the USWA holds bargaining rights. The parties agree that Wayne Owens was subject to the Loeb Convent Glen collective agreement prior to commencing employment at March Road and was not a probationary employee at Convent Glen.
- 28) Two of the four individuals from non-Beaverbrook Loeb stores are from Loeb Blackburn, a store at which the Applicant UFCW holds bargaining rights.
- 29) One of the four individuals comes from Loeb Strafford, a non-union store.
- 30) All of the employees who came to March Road from other Loeb stores retained their employee number and date of service for purposes of benefit calculations. They did not retain seniority and were required to complete a probationary period at March Road.
- 31) Besides the four individuals from non-Beaverbrook Loeb stores, the remaining 45 non-Beaverbrook forms are signed by individuals hired "off the street".
- 32) All of the individuals employed at March Road, from whatever source, received training in respect of their March Road position.
- 33) This training was a minimum of sixteen hours and may have been either within the March Road store, or at another Loeb store or at a remote location.
- 34) The employees were paid wages for the time spent in this training.
- 35) The training occurred between January 18, 1998 and February 13, 1998. All training was completed by February 13, 1998.

- 36) Some individuals worked in the March Road store on February 13, 1998 to assist in setting up the store in preparation for the official opening on February 15, 1998. The work of setting up the store included placing stock on shelves and setting up displays. Of these individuals, four were Beaverbrook employees, twenty-three were not from Beaverbrook and four were employees temporarily "borrowed" from other Loeb stores who were never offered employment at March Road.

Ratification

- 37) The Intervenor held a ratification vote on March 10, 1998 in respect of the agreement of February 13, 1998 between the Respondent and the Intervenor for the March Road store.
- 38) The vote was held by secret ballot and the vote result was in favour of ratification.
- 38.1) A prior ratification meeting had been held February 23, but the vote was cancelled because of poor turnout. Four employees attended this meeting.
- 39) Two employees attended for the vote.
- 40) On the date of the ratification vote, approximately 100 employees were employed at March Road.
- 41) There were no March Road employees on the USWA bargaining committee which concluded the March Road agreement.
- 41.1) Adequate notice of the ratification vote was given to the employees by posting notices in the workplace.

Documents admitted into evidence on consent

- 42) List of Beaverbrook employees dated November, 1997.
- 43) List of March Road employees who worked in the week ending February 28, 1998. March Road employees who did not happen to work this week because of vacation, lack of hours or some other reason, do not appear on this list.
- 44) Set of employment forms, various dates, indicating employees offered employment at March Road by February 13, 1998.
- 45) Four computer printouts indicating persons paid wages in respect of activity on behalf of Loeb March Road in the four week period ending on February 14, 1998.
- 46) Time cards indicating work performed at March Road in the week ending on February 14, 1998. The time cards for the part time employees indicate the dates on which hours have been worked. The time cards for full time employees indicate 40 hours plus overtime hours, but do not specify the dates on which the employees worked. A full time employee working the week ending February 14, 1998 would have worked on February 13, 1998.
- 47) OLRB Certificate in respect of Loeb Beaverbrook dated December 31, 1991.
- 48) Loeb Beaverbrook collective agreement expiring December 31, 1997.
- 49) Loeb March Road collective agreement (subject to section 66 objection).
- 50) Loeb Convent Glen collective agreement.
- 50.1) By way of correction to paragraph 27, the above figures are calculated on the assumption that Wayne Owens came to March Road from Convent Glen. However, in fact Wayne Owens came to Beaverbrook from Convent Glen. He was a probationary employee at

Beaverbrook at the time of going to March Road and the figures above should be amended accordingly.

Argument

5. It is submitted on behalf of the USWA that section 66 of the Act does not apply to the instant fact scenario or, if it is determined that section 66 does apply, that the application of section 66 must be tailored so as to fit the unique circumstances of this case.

6. In support of the USWA's position, counsel urged the Board to take note of the following facts. The collective bargaining relationship between Loeb Inc. and the USWA flows from a Board issued certificate. Following the issuance of the certificate to the USWA the parties negotiated two collective agreements applicable to the Beaverbrook Store. Before the expiry of the second collective agreement, the USWA was advised of the closing of the Beaverbrook Store and the opening of the March Road Store. Loeb Inc. decided to staff the March Road Store with employees from the Beaverbrook Store before hiring from elsewhere. Signs were posted in the Beaverbrook Store advising the clientele that the store was closing and that the March Road Store was opening. The closing of the Beaverbrook Store and the opening of the March Road Store were inextricably bound. Beaverbrook closed on February 14, 1998 and March Road opened on February 15, 1998. The March Road Store is located a very short distance from where the Beaverbrook Store had been located and serves the same neighbourhood that Beaverbrook previously served.

7. The bulk of the employees from Beaverbrook moved over to March Road. Of the 97 individuals who were offered positions at March Road, 51 were from Beaverbrook (45 of the 51 actually moved to March Road in bargaining unit positions). Forty-five of the 48 non-Beaverbrook employees at the March Road Store were hired off the street. All employees who accepted an offer of employment at the March Road Store were made aware, by way of a statement contained on the Employment Offer form, that their employment conditions would be in accordance with the Collective Agreement with the USWA. The Collective Agreement entered into between Loeb Inc. and the USWA with respect to the March Road Store is basically the Beaverbrook Agreement with minor changes to the provisions regarding scope and wages. The March Road agreement was signed by Loeb Inc. and the USWA on February 13, 1998.

8. The March Road Agreement was subsequently ratified by way of a secret ballot vote after adequate notice of the ratification vote had been given.

9. Counsel for the USWA argues that section 66 was never intended to apply to a situation where a company, for reasons relating to better customer access, decides to move, within the same market area, to a larger store and opens the new store at the very same time as it closes the old one. Counsel argues that the situation is no different than if Loeb Inc. had expanded the Beaverbrook store and hired additional employees to staff the expanded space.

10. Counsel argues that the section 66 paradigm is the situation where there is a brand new collective agreement or voluntary recognition agreement and points out that where the Board has applied section 66 to a situation other than the paradigm it has been very careful to ensure that it is applied with a knowledgeable hand because of the interests section 66 was intended to protect. In counsel's submission, the facts of this case are so unique, section 66 has no application.

11. Turning to the USWA's alternative position, counsel argued that, if it is determined that section 66 is applicable, the Board must keep in mind the interests that section 66 was designed to protect and ought not to apply section 66 in a manner that would overshoot its purpose. Counsel asks the Board to consider the fact that, although section 66 has been in the statute for a considerable number

of years, section 44, mandating ratification votes, has recently been added to the statute. Further, counsel points out that section 66 is discretionary such that the Board has the discretion to permit an agreement reached by way of the collective bargaining process to stand. Counsel points to the fact that the agreement between Loeb Inc. and USWA is not a sweetheart deal, the USWA is not a sweetheart union, a significant number of employees who were represented by the USWA at Beaverbrook moved over to March Road and all individuals who accepted employment at March Road were aware of the union and the Collective Agreement, and urges the Board not to apply section 66 in the present circumstances.

12. Counsel for the USWA pointed out that section 66 does not contain a membership requirement. Rather, section 66 refers to an entitlement to represent. Thus, the question for the Board to determine is not whether a majority of the March Road employees were members of the USWA but rather whether the USWA was entitled to represent a majority of the March Road employees.

13. Counsel argues that the USWA was entitled to represent all of the March Road employees who were previously employed at the Beaverbrook Store as all of the Beaverbrook employees were required to be members of the USWA, by virtue of the following articles of the Beaverbrook collective agreement:

ARTICLE II - RECOGNITION

- 2.01 The Company recognizes the Union as the exclusive representative and sole bargaining agent for all employees of the Company as certified by the Labour Relations Board. This Agreement is entered into on behalf of all employees outlined above.

ARTICLE III - UNION SECURITY AND CHECK-OFF

- 3.01 All employees in the bargaining unit, upon completion of their probationary period, shall become and remain members of the Union in good standing during the lifetime of this Agreement as a condition of employment.

In counsel's submission, the USWA was entitled to represent all of the Beaverbrook employees covered by the collective agreement as a result of the requirement that they become members of the union as a condition of employment. With respect to the probationary employees, counsel submits that the USWA was not only entitled to represent them but required to do so and points out that, had the USWA failed to do so, a probationary employee could have filed a duty of fair representation complaint against the union.

14. Counsel further argues that the USWA was entitled to represent everyone else who accepted an offer of employment at the March Road Store because, when they accepted the offer, they agreed to be bound by the USWA Collective Agreement. As a result, it is the USWA's position that, at the material point in time, it was entitled to represent all employees of the March Road Store, whether they were members of the union or not.

15. Relying on *Spring Plastering Limited*, [1967] OLRB Rep. Dec. 887, *Gisborne Design Services Ltd.*, [1995] OLRB Rep. June 796, *York County Quality Foods Ltd.*, [1984] OLRB Rep. Sept. 1340 and *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250 counsel submits that membership evidence is not required in order to establish an "entitlement to represent" and that an entitlement to represent has been found where the employees are members of the union by virtue of having been previously covered by a collective agreement containing a union security clause, where the collective agreement has been ratified and where individuals were made aware, prior to commencing employment, that they would be represented by the trade union. Applying the principles of the above-cited decisions, counsel argues that the USWA is entitled to represent all of the employees at the March Road Store

because the individuals who were previously employed at the Beaverbrook Store were USWA members or, in the case of the probationary employees, were individuals to which the USWA owed a duty of fair representation, and a ratification vote was held at which a majority of the employees voting voted in favour of the agreement.

16. Counsel for Loeb Inc. adopts the submissions made on behalf of the USWA. Counsel advised the Board that Loeb Inc. has stable ongoing collective bargaining relationships with both the USWA and the UFCW at other Loeb Inc. stores in Ottawa and is content to have its relationships continue.

17. Counsel for Loeb Inc. urges the Board to conclude that section 66 does not apply to the instant fact scenario. Counsel highlights the fact that the March Road Store opened coincident in time with the closing of the Beaverbrook Store and that virtually the entire Beaverbrook staff moved to the March Road Store. In counsel's submission, the Board is not faced with the paradigm situation contemplated by the drafters of section 66 as there is no fresh voluntary recognition agreement. Counsel argues that the agreement between Loeb Inc. and the USWA is not a sweetheart deal and that the USWA is not a sweetheart union. Loeb Inc. and the USWA are parties to an ongoing and legitimate relationship who dealt with the employer's need to relocate to another location in the same neighbourhood. Counsel submits that the Board should be hesitant to throw out an established bargaining relationship based on a discretionary clause.

18. Counsel for Loeb Inc. suggested that one option in the Board's power which the Board should consider is the holding of a vote under section 66(2) of the Act. While not suggesting that the number of employees who moved from the Beaverbrook Store to the March Road Store is indicative of the level of the the USWA's representation entitlement, counsel for Loeb Inc. points out that 45 of the 93 employees who initially commenced working at the Loeb Inc. store were former Beaverbrook employees. Although not a majority, counsel suggests that it is a sufficient percentage that the Board would order a vote in a certification application.

19. Counsel for the UFCW submits that there is nothing unusual about the facts of this case.

20. Counsel submits that it is a trite proposition that bargaining rights attach only to the geographic scope or area as set forth in the union's certificate or in its ensuing collective agreement. In the present case, the collective agreement entered into between Loeb Inc. and the USWA for the Beaverbrook store incorporates by reference the bargaining unit description in the certificate issued to the USWA by the Board. Article 2.01 of the Beaverbrook Collective Agreement provides as follows:

The Company recognizes the Union as the exclusive representative and sole bargaining agent for all employees of the Company as certified by the Labour Relations Board. This Agreement is entered into on behalf of all employees outlined above.

21. The unit as described in the Board's certificate is as follows:

all employees of the respondent [Loeb I.G.A. Beaverbrook] at 2 Beaverbrook Road, Kanata, save and except store owner, store manager Loeb Fresh, store manager Loeb Ready, Store Manager Grocery, persons above the rank of store manager Loeb Fresh, store manager Loeb Ready, store manager Grocery, and office and clerical staff.

Thus, the USWA has bargaining rights restricted to employees at a site specific address, namely 2 Beaverbrook Road.

22. Counsel points out that the Board normally defines the bargaining unit in a certificate by reference to a municipality and not to a street address. A certificate is only restricted to a street address

where the employer has multiple locations within the municipality. Counsel submits that the enormous drawbacks of a site specific certificate are well known. Where the union has site specific bargaining rights, the employer could move its operations next door and the union would have no legal entitlement to represent the employees.

23. Counsel submits that where a trade union has site specific bargaining rights the difference between an employer expanding its operations and moving them down the street is the difference between night and day. In the first scenario the trade union maintains its bargaining rights. In the second, the trade union loses its bargaining rights. Where the trade union loses its bargaining rights to regain them it must organize the employees and apply to be certified, or obtain voluntary recognition from the employer.

24. Counsel thus submits that it is a trite proposition that when Loeb Inc. closed its store located at 2 Beaverbrook Road and opened a new store at 4048 Carling Avenue, the USWA had no pre-existing entitlement to represent the employees. It cannot be said that the voluntary recognition agreement for March Road is either a continuation or a renewal of the Beaverbrook collective agreement. It is a different collective agreement for a different bargaining unit which purports to create bargaining rights for the USWA which it did not previously enjoy. In counsel's submission, the March Road collective agreement is a voluntary collective agreement between Loeb Inc. and the USWA in its first year of operation such that section 66 applies.

25. In support of the above submissions, counsel refers the Board to *Mountain View Dairy Ltd.*, [1967] OLRB Rep. Feb. 911 at paragraph 4 where the Board stated as follows:

It must be noted, although no argument was made on this point, that the bargaining rights held by Retail Wholesale were for employees of Mountain View at Dundas (a fact which was drawn to the attention of the parties at the hearing), whereas the operations, with respect to which it claims to represent employees, have been moved to Waterdown. Had there been no sale, but had Mountain View simply moved the base of its own operations from Dundas to Waterdown, it would seem that the bargaining rights of Retail Wholesale would not continue, except by the agreement of the parties. Retail Wholesale could not be in a better position in this case, where Oakville Dairy, having purchased the business of Mountain View, moved its operations to Waterdown. The Board does not, however dispose of the application on this ground.

26. Counsel also refers the Board to *Sunnylea Foods Limited*, [1981] OLRB Rep. Nov. 1640, *Chateau Gardens (Queens) Inc.*, [1979] OLRB Rep. April 289, and *Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526 in which the Board's comments in *Mountain View* were adopted.

27. Counsel submits that, based on the foregoing, as a legal matter, section 66 must apply to the present circumstances.

28. In the event the Board is not persuaded that section 66 applies as a legal matter, counsel urges the Board to have regard to the way in which Loeb Inc. and the USWA dealt with one another. In counsel's submission, the conduct of Loeb Inc. and the USWA indicates that they did not consider themselves bound by the provisions of the Beaverbrook collective agreement. Loeb Inc. decided which of the Beaverbrook employees it would offer employment to at the March Road location. The offer of employment forms, in counsel's submission, make it clear that Loeb Inc. was not transferring the Beaverbrook employees to the March Road location, rather it was engaging in a fresh hiring process. Counsel points to the fact that the seniority provisions of the Beaverbrook collective agreement were not applied: two Beaverbrook employees were not offered employment at March Road; two Beaverbrook employees were offered a demotion to March Road which they did not accept (they received termination packages); two Beaverbrook employees were offered a demotion to March Road which they did accept; one employee accepted a transfer to another Loeb Inc. store; three employees accepted transfers to

other positions at the March Road store; and three employees accepted a non-union management position. All Beaverbrook employees who accepted employment at the March Road store, regardless of their length of service, reverted to probationary status. All employees were required to serve a 90 day probationary period from the date the store opened. Based on the foregoing facts, counsel submits that it cannot be said that Loeb Inc. and the USWA treated the situation as a continuation or amendment to their old collective agreement.

29. Counsel further submits that the situation cannot be characterized as an expansion of bargaining rights. Loeb and the USWA did not expand the scope of the existing bargaining unit to include the March Road store but in fact deleted the reference to the Beaverbrook store and inserted reference to the March Road store.

30. In the alternative, if the Board were to find that there has been an expansion of bargaining rights, counsel submits that the USWA is unable to demonstrate that it was entitled to represent a simple majority of the employees. On the date on which the voluntary recognition agreement was entered into, there were 31 employees on the March Road payroll (employees were being trained in anticipation of the February 15, 1998 store opening), and only four of those employees were individuals who were employed at Beaverbrook. Relying on paragraphs 33 through 38 inclusive of the Board's decision in *Bestview Holdings Limited*, *supra*, counsel argues that, where a group of existing employees are swept into a bargaining unit, the parties to the voluntary recognition agreement are required to demonstrate that the union was entitled to represent a majority of such individuals. In light of the numbers set out above, counsel submits that the USWA cannot establish that it was entitled to represent a majority of the March Road employees as of February 13, 1998.

31. Counsel relies on *Darrigo Supermarkets Limited*, [1975] OLRB Rep. Feb. 93, *Warren Bitulithic Limited*, [1982] OLRB Rep. Sept. 1375, *Eugene Marks*, [1987] OLRB Rep. June 872 and *Gisborne Design Services Ltd.*, *supra* in support of the proposition that the Board takes an arithmetic approach to calculating the union's count position as of the date the voluntary recognition agreement is entered into.

32. In counsel's submission, there is no point in time when the USWA can demonstrate that it was entitled to represent a majority of the employees. Counsel's argument concerning USWA's entitlement to represent as of the date on which the voluntary recognition agreement was entered into is set out above. Alternatively, the Board might calculate the USWA's entitlement to represent based on the offers of employment. These forms indicate that 93 individuals were offered employment at March Road. Forty-five of such individuals were formerly employed at the Beaverbrook Store. Forty-eight of such individuals were non-Beaverbrook employees. Thus, the USWA cannot establish entitlement to represent a majority of the March Road employees based on the fact that the Beaverbrook employees were USWA members. Further, 10 of the Beaverbrook employees were probationary employees who were not required to be members of the USWA, thereby reducing the number of USWA members to 35 of the 93. In response to the USWA's argument that it was entitled to represent the probationary employees at Beaverbrook, counsel for UFCW asserts that USWA's entitlement to represent the probationary employees was limited to matters in relation to their employment with Loeb Inc. at the Beaverbrook Store. In counsel's submission, it was not an entitlement to represent that went beyond employment at the Beaverbrook Store. Thus, only 35 of the 93 employees that started work at the March Road Store were USWA members or individuals that the USWA was entitled to represent.

33. On the official opening date, there were 43 former Beaverbrook employees and 49 non-Beaverbrook employees at the March Road Store. Thus, in counsel's submission, it cannot be said that on the date of the store opening the USWA was entitled to represent a majority of the employees.

34. On February 28, 1998, two weeks following the store opening, there was a total of 98 unionized employees 41 of whom were former Beaverbrook employees.

35. In the alternative, counsel for the UFCW takes issue with the USWA's assertion that any of the individuals who were formerly employed at the Beaverbrook location are its members. Counsel submits that, notwithstanding his invitation to the USWA to do so, no membership evidence has been produced in relation to any of the Beaverbrook employees. Counsel submits that in the absence of such evidence the Board has no proof that any of such individuals were union members.

36. Turning to the ratification vote, counsel submits that the Board decisions which have looked to the outcome of a ratification vote as evidence of an entitlement to represent are distinguishable from the present case. In *York County Quality Foods Ltd.*, *supra* the Board indicated that it was prepared to treat the ratification result as indicative of the will of the majority. Counsel for the UFCW distinguishes *York County Quality Foods Ltd.* on the basis that the collective agreement in issue in that case was explicitly subject to ratification and the trade union had proved by way of union records that 80% of the employees were its members at the time the agreement was entered into. In counsel's submission, the Board's reference to the ratification vote was unnecessary. In *Gisborne Design Services Ltd.*, *supra* the Board found that the employees indicated by way of a ratification vote their willingness to have the trade union represent them. Counsel distinguishes *Gisborne Design Services Ltd.* on the basis that all of the employees attended the ratification vote and only after the majority of employees had voted in favour of ratification, was the agreement signed.

37. Counsel for the UFCW argues that this case turns on whether or not the employees at the March Road Store selected USWA as their bargaining agent. Counsel argues that they did not. None of the employees were on the negotiating committee for the March Road Store and there is no suggestion that employees were asked for their views on proposals.

38. Concerning the ratification vote, counsel points to the fact that a ratification vote was scheduled for February 23, 1998, however, when only four employees showed up the vote was cancelled. The vote was rescheduled for March 10, 1998, at which time only two employees showed up, however, this time the vote was held. Thus, counsel submits that the USWA is relying on a ratification vote at which fewer people showed up than at a vote the USWA cancelled for poor attendance. Counsel argues that, given that there were 100 employees working at March Road on March 10, it cannot be said that the results of the ratification vote indicate that the employees freely and actively selected the USWA to represent them. Further, counsel suggests that in order for the ratification vote to lead the Board to conclude that the USWA was entitled to represent a majority of employees, a majority of the employees would have had to have actually voted at the ratification vote in favour of acceptance as occurred in *York County Quality Foods Ltd.*

39. With respect to the statement contained in the offers of employment to the effect that the individual would be employed in accordance with the USWA collective agreement, counsel for the UFCW suggests that such is employer support for a trade union. In counsel's submission, it cannot be said that the employees have freely selected the USWA if the employer is telling the employee that they have to accept the USWA.

40. In response, counsel for the USWA urged the Board to adopt the approach taken in *Bestview Holdings Limited* which counsel described as an admonishment of form over substance. In counsel's submission, the Board should apply a realistic approach, looking at all of the circumstances and should not pick a particular day and perform an arithmetical calculation on that date. Instead, counsel submits that the Board should ask itself whether the union was entitled to represent the employees.

41. Counsel disputes the submissions made by counsel for the USWA to the effect that the USWA's representation rights for the probationary employees is limited to representing them in respect of their employment at the Beaverbrook Store. Counsel suggests that when a new collective agreement was negotiated the USWA acted as the bargaining agent of the probationary employees and the probationary employees achieved the right of first hire at the March Road Store as a result of such representation.

42. Concerning the ratification vote, counsel argues that the Board's comments in *York County Quality Foods Ltd.* were not *obiter* rather, they were a necessary part of the decision because the memorandum of agreement was specifically subject to ratification such that the union had to prove ratification. In counsel's submission, the Board in *York County Quality Foods Ltd.* adopted the view that the Act is concerned with process as opposed to results. Thus the question for the Board was whether the employees had adequate notice of the ratification vote. Provided such was the case, the wishes of a majority of the individuals voting was sufficient for the Board's purposes. Further, counsel suggests that the cases must now be read in light of section 44 of the Act which provides that a collective agreement is not effective until ratified. Thus, there is no longer any need to explicitly state that a collective agreement is subject to ratification, section 44 requires such.

43. In response to the suggestion that the offers of employment demonstrate employer support, counsel suggests that the Board view the offers of employment in context. The offers of employment arose out of an established collective bargaining relationship which flowed from a Board issued certificate.

44. Counsel for the USWA urges the Board to look at all of the circumstances and refrain from taking a technical approach. In counsel's submission, this is not the situation section 66 was intended to address and the Board should not intervene.

Decision

(i) Does Section 66 Apply?

45. Counsel for the USWA urges me to conclude that section 66 does not apply in the present circumstances. Counsel argues that the facts before me are no different than if Loeb Inc. had decided to expand the Beaverbrook Store and hired additional employees to staff the expanded space and is to be contrasted with the situation where there is a new collective agreement or voluntary recognition agreement which is the situation section 66 was designed to address.

46. It is my determination that the present circumstances are not analogous to an expansion of the Beaverbrook Store and that the facts are such that it is apparent that Loeb Inc. and the USWA have entered into a new, as opposed to continuing an old, collective bargaining relationship. Section 66 is intended to ensure that the right of employees to participate in the selection of a trade union representative is not undermined as a result of an employer granting a trade union voluntary recognition. It is triggered by the voluntary granting of representation rights. For the reasons that follow, it is my determination that such has occurred in the present case and accordingly section 66 applies.

47. It is, as counsel for the UFCW suggests, a trite proposition that bargaining rights attach only to the geographic scope or area as set forth in the union's certificate or as amended by its ensuing collective agreement. In the present case, the bargaining unit description set out in the Board certificate issued to the USWA defines the bargaining unit as employees of Loeb I.G.A. Beaverbrook at 2 Beaverbrook Road. The bargaining unit description set out in the Board certificate is incorporated by reference into the Beaverbrook collective agreement. Accordingly, the USWA's bargaining rights are "site specific" with the result that they are limited to representing employees at 2 Beaverbrook Road.

48. It is equally trite that the enormous drawback of site specific bargaining rights is that, should the employer in good faith move its operations to any other location, including a location next door, the union has no legal entitlement to represent the employees at the new location (see: *Mountain View Dairy Ltd.*, *supra*; *Sunnylea Foods Limited*, *supra*; *Chateau Gardens (Queens) Inc.*, *supra*; and *Silverwood Dairies*, *supra*).

49. Thus, as a result of the fact that its bargaining rights were site specific vis-a-vis the Beaverbrook Store, when Loeb Inc. closed the Beaverbrook Store and opened the March Road Store, the USWA had no pre-existing entitlement to represent the employees at the March Road Store.

50. Based on the facts before me, it is apparent that the Loeb Inc. and the USWA recognized that the USWA had no entitlement to represent the employees at the March Road Store arising out of the Beaverbrook collective agreement and that they entered into a new collective bargaining relationship with respect to the employees at the March Road Store. Loeb Inc. and the USWA did not amend the scope clause of the Beaverbrook collective agreement so as to include the March Road Store. Rather, Loeb Inc. and the USWA negotiated an entirely separate collective agreement to apply to the March Road Store. Although most of the employees from the Beaverbrook Store were offered positions at the March Road Store, a number of employees were not offered positions at March Road, were offered demotions to March Road, or were transferred to different positions at March Road. None of the employees retained their seniority from the Beaverbrook Store. All of the employees, upon commencement of employment at March Road, reverted to probationary status and were required to serve a 90 day probationary period. Thus, the parties themselves recognized that the USWA had no pre-existing right to represent the employees at the March Road Store and that the collective bargaining relationship with respect to the employees at the March Road Store was a new, as opposed to a continuing, relationship.

51. Thus, the facts before me are not analogous to an expansion of the Beaverbrook Store. In such a case, the USWA would have had a legal entitlement to represent all of the employees at the store and would have simply continued in its representative capacity. No new collective bargaining relationship or collective agreement would have been necessary. No voluntary recognition would have occurred.

(ii) Entitlement to Represent

52. Counsel for the UFCW argues in favour of an arithmetical approach to determining whether the USWA can, at any time, show that it was entitled to represent a simple majority of the employees at March Road. Counsel for the USWA urges the Board to consider all of the circumstances and avoid adopting a technical approach to the determination of his client's representation entitlement. Further, counsel for the USWA urges the Board to exercise its discretion under section 66 and decline to declare that the USWA is not entitled to represent the employees at March Road.

53. It is my determination that, applying either of the approaches urged upon me, the USWA has failed to demonstrate that it is entitled to represent a majority of the employees at March Road.

54. Considering the facts before me on a purely arithmetic basis, it is my determination that, at no time, can the USWA show that it was entitled to represent a majority of the employees at March Road. As argued by counsel for the UFCW, at no time did the Beaverbrook employees transferred to March Road constitute a majority of the employees at March Road. Thus, even assuming that the USWA's representation rights with respect to these individuals at the Beaverbrook Store is sufficient to demonstrate an entitlement to represent such individuals, it would not be sufficient to demonstrate that the USWA was entitled to represent a majority of the March Road employees.

55. Further, I am not persuaded that the fact that the employees were made aware of the fact that they would be represented by the USWA upon commencement of employment bestows upon the USWA an entitlement to represent such individuals. The only case in which such a factor was given weight is the case of *Bestview Holdings Limited*, *supra*. *Bestview Holdings Limited* was, however, concerned with a scenario where the collective bargaining parties agreed to expand the scope of an existing collective agreement so as to include a new location at which employees had not yet been hired. The Board considered at length the distinction between the situation before it and the creation of a new bargaining unit by way of voluntary recognition. In the context of the creation of a new bargaining unit, the Board remarked that section 66 (then section 60) ensures that the employees are afforded an opportunity similar to what would be available to them in the context of a union organizing drive and certification application to fully participate in determining their own fate. In this regard, the Board, at paragraph 25, referred to the fact that employees would have the ability to engage in debate over the strengths and weaknesses of the union, and perhaps its rivals, and thereby potentially influence the outcome. In contrast, in a situation where the parties to an existing collective agreement agreed to expand the scope of the bargaining unit, the Board remarked that employee self-determination has to be balanced with the dangers of a fragmented bargaining structure. The Board expressed its view, at paragraph 35, that the rights of future employees should bow to the benefits of broadly-based bargaining structures. Accordingly, the Board indicated that, provided the employees hired into the newly-added portion of the bargaining unit were made aware at the time of hiring that their jobs would entail trade union representation, the Board would exercise its discretion so as to uphold an agreement entered into before there were any employees in the unit.

56. In the present case, Loeb Inc. and the USWA did not expand the scope clause of the Beaverbrook collective agreement, or any other collective agreement to which they are parties, so as to include the March Road Store. Loeb Inc. and the USWA created an entirely new collective agreement and thus an entirely new bargaining unit. Accordingly, there is no policy rationale, such as the desire to avoid a fragmented bargaining structure, which would lead the Board to give the employees' right to participate in the selection of their own bargaining agent less significance. The present fact scenario is the creation of a new collective bargaining relationship which, as the Board stated in *Bestview Holdings Limited*, should entail employee participation. It cannot be said that being presented with an offer of employment which indicates that the bargaining agent has been pre-selected and forecloses the employee from engaging in any debate as to the identity of his/her bargaining agent or the selection thereof constitutes employee participation. Accordingly, I do not accept that the fact that the employees knew, prior to commencing employment at March Road, that they would be represented by the USWA is indicative of the USWA's entitlement to represent them.

57. I turn then to the ratification vote. My findings in this regard are concerned solely with the issue of whether the ratification vote is sufficient to establish the USWA's entitlement to represent the March Road employees for the purposes of section 66 and are in no way concerned with the issue of whether the ratification vote would be sufficient for the purposes of section 44.

58. As indicated in the Agreed Statement of Facts, a ratification vote was scheduled and cancelled when only four people turned up to vote. A second vote was scheduled. Adequate notice of the vote was given. Two people showed up. The vote was held and the vote result was in favour of ratification. At the time the vote was held, there were 100 employees in the bargaining unit.

59. In my view, the fact that two of 100 employees voted in favour of the March Road collective agreement, is, when viewed in combination with the lack of any other evidence going to support such a conclusion, insufficient to establish that the USWA was entitled to represent a majority of the employees at the March Road Store.

60. Having determined that the USWA cannot establish on an arithmetic approach that it was entitled to represent a majority of the employees, I turn to consider whether, by viewing all of the circumstances together, I am able to conclude that the USWA has established that it had an entitlement to represent the employees at the March Road Store. It is my determination that it has not.

61. As indicated above, I do not accept that the scenario before the Board is analogous to an expansion of the Beaverbrook Store or a continuation of the collective bargaining relationship that had existed between Loeb Inc. and the USWA with respect to the Beaverbrook Store. The USWA had no legal entitlement to represent the employees at the March Road Store. Loeb Inc. and the USWA conducted themselves in manner that demonstrates that they recognized this fact. A new collective agreement was negotiated and no recognition was given to the seniority accumulated by Beaverbrook employees who were offered jobs at the March Road Store.

62. As the Board remarked in *Bestview Holding Limited*, the creation of new bargaining rights, either by way of certification or by way of voluntary recognition, entails employee participation and employee choice. In the present case, there is very little evidence of employee participation (or consultation) in connection with the selection of the USWA as their bargaining representative at March Road. There is no evidence of the employees at Beaverbrook being advised, in advance of the USWA's actually obtaining such, that the USWA would be seeking voluntary recognition from Loeb Inc. for the March Road Store or of the employees being kept informed throughout the ensuing negotiations as was the case in *York County Quality Foods Ltd.* No meetings were held with employees to discuss what was occurring and no employees were on the negotiating committee. In contrast, employees were informed, by way of their offer of employment, that they would be represented by the USWA at the March Road Store.

63. Thus, in a situation where new bargaining rights are being created and employee participation and choice is of paramount importance, there is little if any evidence to support a determination that the employees hired to work at the March Road Store had any participation in the selection of their bargaining agent. Such being the case, I am not persuaded that the circumstances, when viewed as a whole, either establish that the USWA was entitled to represent a majority of the employees at March Road or should cause me to exercise by discretion so as to uphold the March Road collective agreement.

* * * * *

64. Accordingly, for the foregoing reasons, it is my determination that the March Road collective agreement is a voluntary collective agreement between Loeb Inc. and the USWA in its first year of operation such that section 66 applies and that the parties to the March Road collective agreement have not established that the USWA was entitled to represent the employees in the bargaining unit. I declare that the USWA forthwith ceases to represent the employees in the bargaining unit defined in the March Road collective agreement and the March Road collective agreement ceases to operate forthwith.

65. As a result of my determination in the foregoing paragraph there is no bar to the application for certification filed by the UFCW and I find it to be timely.

66. It appears to the Board on an examination of the evidence before it that not less than forty per cent of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time the application was made.

67. This matter is referred to the Manager of Field Services for the appointment of a Labour Relations Officer for the purpose of consulting with the UFCW and Loeb Inc. and determining arrangements for the conduct of a vote upon completion of which a further decision of the Board will issue directing that a vote be held.

68. I am seized.

0320-98-R; 4303-97-R United Steelworkers of America, Applicant v. **Maxi**, Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor; United Steelworkers of America, Applicant v. **Maxi & Co.**, A Division of Provigo Inc., Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor

Certification - Collective Agreement - Termination - Timeliness - Voluntary Recognition - USWA seeking to represent employees employed at two different retail stores - UFCW claiming pre-existing bargaining rights at the stores through voluntary recognition and asserting that certification applications untimely - UFCW and employer entering into agreement prior to opening of the stores and at time when no employees had yet been hired - Board finding no basis to conclude that UFCW was entitled to represent employees in either bargaining unit at the time that the agreement was entered into - Board terminating UFCW's bargaining rights pursuant to section 66 of the Act - Board permitting UFCW opportunity to make submissions regarding timeliness of USWA applications and why the Board should not take approach suggested by *T.R.S. Food Services* case

BEFORE: *Pamela Chapman*, Vice-Chair.

DECISION OF THE BOARD; August 13, 1998

1. These are applications for certification for units of employees working at two different retail stores operated by Provigo Inc. carrying on business as Maxi or Maxi & Co. ("Provigo").
2. By decisions dated February 25, 1998 and May 1, 1998, the Board directed the taking of representation votes at the two locations, but in each case ordered the ballot box to be sealed. Indeed, the ballots have still not been counted, as there is a dispute as to whether or not the applications by the United Steelworkers of America ("the USWA") are timely. At each location the United Food and Commercial Workers International Union, Local 175 ("the UFCW") claims to have pre-existing bargaining rights by virtue of a voluntary recognition agreement with Provigo. It is not disputed that the instant applications would not be timely should the voluntary recognition agreements be determined to be valid. However, the USWA argues that there is no voluntary recognition agreement within the meaning of the Act, and in the alternative that any agreement found by the Board should be terminated pursuant to section 66 of the *Labour Relations Act, 1995* ("the Act"), or because of employer support contrary to section 15 of the Act.
3. At the hearing of this matter on June 19, 1998 the Board examined the status of the alleged voluntary recognition agreement on the basis of a statement of the UFCW's "best case". Counsel for the UFCW prepared a detailed statement of material facts, and filed a number of documents, in support of its position that it has a voluntary recognition agreement with Provigo applicable to the two stores which are the subject of the instant applications for certification by the USWA. Counsel argued strenuously that the Board ought not to decide whether or not there is a voluntary recognition agreement in place based upon this statement of facts and a review of the documents, but should first hear oral evidence to give the allegations a fuller factual context. However, having regard to the nature of the factual allegations, which are essentially undisputed, I concluded that it was appropriate to consider at the outset whether or not, presuming that the facts asserted by the UFCW are true and provable, the

Board could in that event conclude that there is a voluntary recognition agreement in place which operates as a bar to the applications for certification.

THE FACTS

4. The following facts relating to the issues in these applications are not in dispute.
5. The USWA has applied to be certified as the bargaining agent at two stores operated by Provigo in Ontario: one at 1455 McCowan Road in Scarborough ("the Scarborough store") which is operated under the Maxi & Co. banner, and a second at 114 Hamilton Street North in Waterdown ("the Waterdown store") which is operated as a Maxi store.
6. The UFCW has entered into approximately 150 collective agreements with Provigo in Quebec, at stores operated under the Maxi & Co., Maxi and LINC banners, and at least 45 agreements in Ontario at Loeb stores.
7. At a meeting between senior officials of the UFCW and of Provigo held on December 19, 1996, the parties discussed a framework for standardizing certain terms and provisions of collective agreements between the UFCW and Provigo in Ontario and Quebec, as well as a framework for the recognition by Provigo of the UFCW as the bargaining agent for employees of new stores to be opened by Provigo under the Loeb, Maxi & Co. and Maxi banners.
8. These discussions continued at further meetings between January 7 and August 15, 1997. By letter dated July 25, 1997, the UFCW's Canadian Director, Tom Kukovica, confirmed that at a meeting held on June 17, 1997 Provigo agreed to voluntarily recognize the UFCW at all new Maxi & Co., Maxi and Loeb stores opened, built or converted, except within the jurisdiction of the RWDSU/UFCW Northern Joint Council where such Council would be recognized.
9. The final agreement concerning these arrangements was incorporated into a written document described as a "Partnering Agreement", which was signed by representatives of Provigo and the UFCW on August 15, 1997. That agreement contains the following provisions which are important in the present case:

In consideration of the commitments contained herein the following is agreed to:

1. When new Provigo stores open or are to be opened, Provigo agrees that it will voluntarily enter into a voluntary recognition agreement with the Partner Union. Such agreement will recognize the Union as the exclusive bargaining agent for employees of Provigo at that store and street address in a bargaining unit that will be an "all employee" bargaining unit save and except:
 - (i) Loeb or Provigo - one Director, one Assistant Director, six Department Managers, office employees, one inventory controller and management trainees;
 - (ii) Maxi stores - one Director, one Assistant Director, six Department Managers, office employees, one inventory controller and management trainees;
 - (iii) Maxi & Co. stores - one Director, two Assistant Directors, nine Department Managers, office employees, two inventory controllers and management trainees;
 - (iv) New banners - consistent with the above.
2. The term "new Provigo stores" as used in this Agreement means stores which are not in existence as of the date hereof but which will be newly constructed and opened for business after the date of this Agreement.

3. In the case of existing Provigo stores that are not presently certified or accredited and for non Provigo stores that will be acquired by Provigo in the future and that are not certified or accredited, the decision of whether or not to join a Union and have it represent them as their bargaining agent is strictly up to the employees of those stores. Provigo undertakes to communicate the message of free choice to employees and management and to inform the management teams of such stores of Provigo's position on this issue. In the event that any of these stores is faced with a Union organizing campaign or application for certification or accreditation by the Partner Union, Provigo undertakes that a clear message of free choice will be communicated to the employees of that store stating, without any ambiguity, that employees are free to join the Union if they wish.

If the Partner Union becomes accredited, the parties will negotiate and enter into a first Collective Agreement based upon the principles agreed to in this Partnering Agreement.

4.
 - (i) The parties hereto agree that there is to be only one certification and accreditation and one Collective Agreement per site/facility and that the recognition clause shall refer to that site/facility by name and street address.
 - (ii) The parties also agree that the expiry dates must be staggered so that not more than one store in any region or sector is vulnerable to strike action at any time.
 - (iii) The Union agrees that each of Provigo's stores is a separate Employer from any other related or associated stores, whether carried on by or through more than one corporation, individual, firm, syndicate, association or franchise, or any combination thereof, under common control or direction, and the Union agrees that it will not, at any time, make an application to the Ontario Labour Relations Board pursuant to Section 1(4) of the Ontario *Labour Relations Act*, as amended from time to time, nor will it seek to combine the bargaining unit of one store with any other bargaining unit of Provigo.

10. Prior to the signing of this agreement, the UFCW and Provigo had begun negotiations for standard or model collective agreements for each of the Maxi & Co., Maxi and Loeb stores to be opened. These agreements were finalized by November 1997. Blanks were left in each of these collective agreements for implementation dates, wages, employee benefits and other provisions which were to be separately negotiated for each new store after it opened.

11. The UFCW applied to be certified at two stores opened by Provigo during this time frame, in Mississauga and Oakville. After the taking of representation votes, the UFCW was certified at each location as the bargaining agent for employees. The Mississauga store was opened prior to the execution of the agreement described at paragraph 9 above.

12. The Scarborough Maxi and Co. store to which the application in Board file 4303-97-R relates opened on or about December 10, 1997.

13. On December 18, 1997 a senior official of Provigo wrote to a senior official of the UFCW concerning the Scarborough store, confirming a conversation wherein Provigo advised the UFCW that "consistent with our agreement dated August 15th providing voluntary recognition we are prepared to begin the negotiations for Maxi & Co. Scarborough".

14. On February 5, 1998, the employer included a written announcement regarding the recognition agreement with the UFCW in the pay cheque envelopes of all employees at the Scarborough store. This notice stated that "you will be notified by the Union in the very near future of a Ratification Meeting to implement a proposed Memorandum of Agreement which has been reached between the Company and the UFCW".

15. On or about Tuesday, February 10, 1998, the UFCW posted a notice in the Scarborough store announcing that a ratification vote would be held on Sunday, February 15, 1998 at a hotel near the workplace.

16. On February 11, 1998, the USWA filed an application for certification with respect to the Scarborough store. Membership evidence filed with that application had been signed by employees between December 16 and February 10, 1998.

17. At the ratification vote held on February 15, 1998, the collective agreement proposed by the UFCW was rejected by a vote of ten to five. Representatives of the USWA attended at the hotel where the vote was taken and spoke to employees, and literature concerning the proposed collective agreement was circulated by the USWA prior to the vote. The UFCW asserts that the proposed collective agreement was not ratified by employees on February 15 because of this action by the USWA.

18. A negotiating committee for the bargaining unit at the Scarborough store was struck by the UFCW on February 15, 1998. The UFCW applied for conciliation on February 24, 1998 and conciliation was granted on March 9, 1998. A no-board report was issued on May 22, 1998. A proposed collective agreement between Maxi & Co. and the UFCW for the Scarborough store was ratified by employees on June 7, 1998.

19. The Waterdown store to which the application in Board file 0320-98-R relates opened on or about March 17, 1998.

20. Prior to the opening, on March 4, 1998, the UFCW and Provigo reached a proposed collective agreement and the UFCW posted a notice in the store announcing a ratification vote to be held on March 11, 1998. Of the thirty-eight employees who attended the meeting, nineteen voted for and nineteen against ratification. The USWA also distributed literature among employees prior to this vote, and the UFCW claims that this interfered with the expression of employee wishes.

21. On April 23, 1998, the USWA filed an application for certification with respect to the Waterdown store. Membership evidence filed with that application had been signed by employees between February 16 and March 23, 1998.

22. The UFCW applied for conciliation for the Waterdown store on March 12, 1998 and conciliation was granted on March 25, 1998. A no-board report was issued on May 22, 1998. A proposed collective agreement between Maxi & Co. and the UFCW for the Waterdown store was ratified by employees on June 7, 1998.

23. In order to demonstrate that it was entitled to represent employees at the Waterdown store, the UFCW retained an arbitrator to determine whether the majority of employees were members. The arbitrator met with representatives of the union and the company at the union offices on March 20 and 23, 1998, and reviewed membership cards in the possession of the UFCW. After comparing the signatures on these cards to sample signatures provided by Provigo, and considering the number of employees agreed by these parties to be in the unit, the arbitrator produced a report dated March 25, 1998 which states that "a majority of employees supported the union".

EXISTENCE OF VOLUNTARY RECOGNITION AGREEMENT

24. There is no definition of a voluntary recognition agreement in the Act. However, sections 7(3) and 18(3) clearly contemplate the use of such an instrument to obtain bargaining rights, and, importantly, neither section was altered by Bill 7, which implemented mandatory representation votes

in certification proceedings. Both sections state that such an agreement must be in writing, signed by the parties, and must relate to a defined bargaining unit.

25. The agreement between the UFCW and Provigo dated August 15, 1997 is certainly in writing and signed by the parties. It is not described as a voluntary recognition agreement, and it clearly deals with matters unrelated to the recognition of the UFCW as bargaining agent, including the apparent amendment of existing collective agreements, but neither of these facts prevent its characterization as a voluntary recognition agreement.

26. The USWA argued that the August 15th agreement simply is not, on its face, an agreement to voluntarily recognize the UFCW. Counsel asserted that the only reasonable interpretation of paragraph 1 of the agreement is that it is an agreement between the parties to enter into a voluntary recognition agreement at some later date. This interpretation, it was argued, is supported by reference to the responses to the application filed by Provigo. At paragraphs 4 through 7 of Schedule B to the response, Provigo states that:

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4. On August 15, 1997, Provigo Inc. signed an agreement with the United Food and Commercial Worker's Union Local 175/633 (UFCW) ("the agreement"). This agreement included an undertaking from Provigo to recognize the UFCW as the exclusive bargaining agent for any Maxi & Co. store already open or which subsequently opened.
5. The voluntary recognition which Provigo undertook to provide stipulated a defined bargaining unit consisting of all employees at the address at which the store was located, save and except one Director, two Assistant Directors, nine Department Managers, office employees, two inventory controllers and management trainees.
6. On December 10, 1997, the Respondent opened its store at 1455 McCowan Road.
7. After the opening of the store, and pursuant to the agreement, the Respondent recognized the UFCW as exclusive bargaining agent in a defined bargaining unit consisting of all employees of Maxi & Co. at 1455 McCowan Road in the City of Toronto. A general announcement was made to the employees at the store on February 5, 1998 by way of a letter enclosed with employees' paycheques.

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27. This submission was vigorously countered by counsel for the UFCW, who pointed to paragraph 6 of the statement of material facts which states:

It was specifically understood and agreed by the parties that these agreements constituted voluntary recognition by Provigo of the UFCW for the employees of Maxi & Co., Maxi and Loeb stores which were to be opened in the future in Ontario and the bargaining units were defined in such agreements. Provigo and the UFCW agreed that separate collective agreements would then be negotiated by them for each new Maxi & Co., Maxi and Loeb store as such stores were opened in the future in Ontario.

28. Counsel advised that, if permitted, he would call witnesses involved in the negotiations between the UFCW and Provigo to establish irrefutably that it was the intent of these parties that the August 15, 1997 agreement constitute a voluntary recognition agreement. Given that the Board's ruling at this stage of the proceedings was agreed to be based upon the UFCW's best case, I cannot therefore accept the argument of the USWA that the "Partnering Agreement" was nothing more than an agreement to enter into an agreement at some later date.

29. However, there remains the question as to whether or not the August 15th agreement grants voluntary recognition to the UFCW for a defined bargaining unit, as that term is used in the Act. As set out above, the recognition portion of the agreement states that it applies to all new Provigo stores, with bargaining units to be all employee units, separately for each store at its street address, with certain named exclusions depending on the banner under which the store is opened. This language means that the basic parameters of the proposed bargaining units have been defined, but, by definition, none of the bargaining units actually existed at the time the agreement was entered into and could not, therefore, be defined by location.

30. I have some reservations about concluding that this approach to defining a bargaining unit for the purposes of voluntary recognition is adequate. However, in this case, given my conclusions on the other issues considered below, I have decided not to take what might be an overly technical approach to the statutory reference to a "defined bargaining unit". I have therefore concluded that, should the facts asserted by the UFCW be proven (and virtually all those facts are undisputed), the UFCW and Provigo would be found to have entered into a voluntary recognition agreement on August 15, 1997.

SECTION 66 OF THE ACT

31. Section 66 of the Act provides as follows:

66. (1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 18 (3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

32. In the present case, the USWA asserts simply that the UFCW cannot establish that they had the support of employees in the bargaining units at the time the voluntary recognition agreement was entered into, *as there were no employees in either bargaining unit on August 15, 1997*. As it is not disputed that neither store was open on that date, and that no employees had yet been hired, the USWA submits that there is no need to hear any evidence on the issue of employee support, or to take into account the report on membership at the Waterdown store prepared by an arbitrator in March, 1998.

33. The Board has considered in several earlier cases whether or not a union and an employer may enter into a voluntary recognition agreement for a unit of employees which does not yet exist. It was not disputed that, generally, the cases stand for the proposition that such an agreement will not be found to be valid.

34. The one notable exception to this rule was articulated by the Board in *Nicholls-Radtke*, [1982] OLRB Rep. July 1028. In that case, a construction company entered into an agreement with a local of the Lumber and Sawmill Workers' Union to apply the terms of an existing collective agreement (with an area contractors' association) to workers hired by it to work at a project which had not yet begun, at a time when there were no employees in the proposed bargaining unit. This agreement was made on the basis that the local union would supply workers from its hiring hall to work on the project when it began.

35. When another union brought an application for certification, the Lumber and Sawmill Workers' Union sought to intervene, arguing that the application should be barred due to its pre-existing agreement with *Nicholls-Radtke*. The applicant union took the position that the intervenor did not have a valid collective agreement, relying upon numerous Board decisions invalidating alleged voluntary recognition agreements entered into at a time when the employer had no employees, even if only a few days before employees began work. This was the result in *Sunrise Paving and Construction Co. Ltd.*, 72 CLLC 16,060, at page 795, where the Board stated:

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"15. It is readily apparent that the alleged collective bargaining relationship between the respondent and the intervenor arose as a result of an arrangement between them without reference to or consultation with the employees who would be affected by this arrangement. Clearly, the respondent selected the intervenor as the bargaining agent for its future employees. Such an arrangement strikes at the very spirit of the *Labour Relations Act* which envisages the selection of a bargaining agent by the employees concerned without the intervention or influence of their employer.

36. In *Nicholls-Radtke*, *supra*, the Board considered this general approach and made the following comments on what it described as a "very basic policy choice for the Board":

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11. In the *Sunrise Paving* case, the Board commented that "the employees of the respondent did not have an opportunity to select their bargaining agent". While in a case where the employer recruits employees who are subsequently forced to join the union, without a previous history of membership that may constitute support for the trade union. The simple fact is that in the construction industry, the unemployed members in a union's hiring hall have in fact selected their bargaining agent as their union, and once they are referred to a job, that selection normally continues. As a consequence, one is faced with a rather difficult problem in interpreting how far the stated policy of the Board in the *C. Strauss* case should be carried. If an agreement is invalid because it was signed when there were no members in the bargaining unit, does the agreement become valid when, in the same circumstances it is signed after the employees have arrived at the job site. Thus, in the present case, would it really have made any difference concerning the wishes of employees if instead of signing the agreement on October 8, 1975, with an intention to supply at a later date, an agreement to supply had been made between the respondent and the intervenor on the 16th of October, when there were two members of the intervenor union employed in the bargaining unit? To say that the document is valid then, but not valid if signed on the 8th, in completely similar circumstances, is to propose a distinction without a difference.

37. The Board concluded that the agreement with the Lumber and Sawmill Workers' Union was valid, despite the fact that it was signed at a time when there were no employees in the union. While the argument made by the applicant union in that case, as in many of the other cases, was based upon an allegation that the agreement was tainted by employer support, the Board also considered the relevance of section 60 (now section 66) of the Act, and concluded that its approach was consistent with the goals of that section, noting that it had found that the "collective agreement signed in the circumstances of the present case is not the result of some agreement between employer and the trade union subverting the rights of employees as, for instance, in the *Sunrise Paving* case" (at paragraph 16).

38. In the present case, there is no claim that the facts are analogous to those in *Nicholls-Radtke*, supra, and therefore no assertion that the agreement falls within any established exception to the general rule. However, the UFCW points to the Board's decision in *Nicholls-Radtke*, supra to demonstrate that there is no hard-and-fast rule that a voluntary recognition agreement may not be entered into before employees are hired. The intervenor, and the employer, ask that the Board extend the approach taken in *Nicholls-Radtke* to the facts in this case.

39. The essence of the decision in *Nicholls-Radtke* seems to me to be a conclusion, entirely reasonable on the facts of that case, that employee choice was not compromised by the employer and union entering into an agreement in those circumstances. Indeed, the Board determined that the employees who would ultimately be employed by the employer had already expressed their choice of a bargaining agent by becoming members of the union and signing on at the hiring hall, before the union entered into any agreement with the employer. I agree with the conclusion of the Board that the goal of employee choice was met, and the interests of the union and its membership in obtaining work were furthered, by the voluntary recognition agreement in that case.

40. At both the Scarborough and Waterdown stores which are the subject of the present case, I cannot but conclude that employee choice played absolutely no role in the arrangement entered into by the UFCW and Provigo. The "Partnering Agreement" does not involve the UFCW referring members for employment at the new stores when open, and there were no members of the UFCW employed at the stores to be covered by the agreement, given that those stores did not yet exist. Bargaining for proposed collective agreements was carried out by the union and the company with absolutely no input from employees (until after the first attempts to ratify those agreements failed), and many of the terms were settled long before the stores had even opened. At Waterdown, the first ratification meeting was even held before the store opened. In these circumstances, it was clearly the employer, and not the employees, which chose the UFCW as bargaining agent, and significant steps were taken by the parties to implement that choice long before employees were given any opportunity to participate and express their views.

41. It is exactly these kinds of concerns, that employee choice in the selection of a bargaining agent not be negated through voluntary recognition, that section 66 seeks to address. Both the UFCW and the employer argued that the Board should not have such concerns in the present case, given the status of the parties as established and experienced "players" in the world of collective bargaining, with a long-standing relationship between them. With parties like these, it was argued, the Board need have no concern that voluntary recognition means that the union is dominated by the employer, or has been created by it, or that the agreement is part of some collusion between union and employer that is not in the best interests of employees.

42. I cannot agree that the Board should be unconcerned about employees having an opportunity to exercise choice just because an established and reputable trade union claims to represent them. As counsel for the USWA argued, the standard applied under section 66, and the approach taken by the Board to employer support allegations, will be relied upon by a variety of trade unions who may seek to represent employees by way of voluntary recognition, including those which may be vulnerable to employer domination, and the "rules" should be designed with that in mind. In any event, it is not clear that by enshrining employee choice the Act seeks only to avoid coercion by employers; it is also generally the case that choice of bargaining agent permits employees to choose among trade unions which might have quite different attributes and approaches.

43. Counsel for the UFCW also suggested that the requirement to hold ratification votes which was created by the amendments to the Act made in 1995 should influence the Board's assessment of whether or not the existence of a voluntary recognition agreement compromises employee choice. It is

likely that a successful ratification vote, if it is proximate to the time when the voluntary recognition agreement was signed, will be evidence of employee support that the Board will want to consider in the context of section 66. (In some cases, however, as in the present case, there may be allegations that the existence of the voluntary recognition agreement taints the outcome of the ratification vote through employee perception of employer support and therefore negates the expression of employee support.) However, the Act quite clearly references the demonstration of entitlement to represent employees to the time when the agreement was signed, which in the present case was August, 1997. Whatever the employees who ratified the present agreements in June, 1998 were expressing by their votes, and as noted that is in dispute, they cannot be found to have been demonstrating support for the UFCW at the time it purported to be entitled to represent them in August, 1997.

44. Having carefully considered the arguments made by counsel for the UFCW and the employer, I cannot find any basis, having regard to the intervenor's "best case" and presuming all of the facts upon which it relies to be true, upon which the Board could conclude that the UFCW was entitled to represent the employees in either bargaining unit at the time it entered into a voluntary recognition agreement with Provigo.

45. Accordingly, pursuant to section 66 of the Act, the bargaining rights of the UFCW for employees of Provigo at the Scarborough and Waterdown stores are hereby terminated.

TIMELINESS OF THE APPLICATIONS FOR CERTIFICATION

46. Counsel for the USWA argued that, should the Board terminate the bargaining rights of the UFCW pursuant to section 66, there is no bar to the certification applications filed by the USWA for the two bargaining units.

47. The statute is not entirely clear as to the effect of a declaration under section 66 where pre-existing rights acquired by voluntary recognition are asserted as a bar to a later application. This issue was considered by the Board in *T.R.S. Food Services Limited*, [1980] OLRB Rep. March 360 at paragraphs 12 through 14:

• • •

12. Counsel for the intervenor argued that a declaration under section 52 of the Act does not have a retroactive effect. Instead, in counsel's submission, the declaration only operates to cancel the agreement from the time of the declaration forward. Pursuant to this reasoning, counsel contends that because the voluntary recognition was in existence at the time the application for certification was filed, it would operate as a bar to the applicant's application for certification, notwithstanding the Board's declaration that it is null and void.

13. If that argument obtains, section 52 of the Act becomes unduly technical and cumbersome to apply. It would only bifurcate proceedings to first require a union to launch a separate section 52 application to clear the way for a later application for certification. More importantly, it is contrary to common sense to suggest that if the intervenor was not entitled to represent the employees when the recognition agreement was entered into that the agreement could still be raised as a bar to an application for certification by another union. Furthermore, such an interpretation is neither dictated by the words of section 52 nor in keeping with the Board's jurisprudence. In the *Operative Plasterers' and Cement Masons' International Association of the United States and Canada, supra*, the Board, following its declaration that the union was not entitled to represent the employees in the bargaining unit at the time the collective agreement was entered into, stated that the alleged collective agreement never was a collective agreement and emphasized the inherent difficulties of attempting to secure a collective agreement in the construction industry by means of voluntary recognition. In *Trent Metals Limited, supra*, the Board determined at page 830 of its decision that the applicant was not entitled to represent the employees in the bargaining unit at the time the recognition agreement was entered into. The Board affirmed that the agreement could not bar the intervenor's application.

14. A careful reading of section 5(3) indicates that the bar raised against an application for certification by a voluntary recognition agreement is predicated on the Board not having made a declaration under section 52. In this instance the applicant's application for certification has been deemed by this Board to be an application under section 52 of the Act. The Board has considered the representations of the parties and has declared pursuant to section 52 that the intervener at the time it entered the voluntary recognition agreement with the employer was not entitled to represent the employees in the bargaining unit. Accordingly, the Board further declared that the intervener forthwith ceased to represent the employees in the bargaining unit defined in the recognition agreement. Because the Board has made a declaration under section 52, the clear wording of section 5(3) stipulates that the bar that would otherwise be imposed by section 5(3) in the face of the recognition agreement does not apply.

48. I am inclined to accept this reasoning and conclude that there is no bar to the instant applications. However, counsel for the UFCW and Provigo urged me at the hearing on the UFCW's best case not to make any final order in that regard before giving them some further opportunity to make their submissions on what the effect of a declaration under section 66 should be, and to explore any other basis for a bar. Given the basis on which the case was argued, I am prepared to hear from counsel on this issue should they wish to make some argument as to why I should not take the approach suggested by *T.R.S. Food Services Limited, supra*, or to draw to my attention some other cases. Similarly, the UFCW may still wish to assert that the appointment of a conciliator with respect to each of the two bargaining units operates as a bar, even though it seems clear that those appointments were made on the basis of a valid voluntary recognition agreement and must fall with its termination.

49. The UFCW has made certain allegations relating to literature circulated by the USWA which it asserts should impact on the Board's reliance on the membership evidence to find an appearance of forty percent support. It has stated that in the event that the Board intends to proceed with the applications for certification filed by the USWA it will pursue these allegations in an attempt to defeat them.

50. Finally, the USWA has made allegations relating to employer support. There is no need for the Board to consider these allegations as they relate to the validity of the voluntary recognition agreement given my conclusions under section 66 of the Act. However, should the USWA fail to win either representation vote, it may seek to rely upon these allegations in order to obtain some relief from the Board pursuant to section 11 of the Act.

51. Having regard to all of these outstanding issues, the following procedure will be followed at the hearing scheduled to begin on August 19, 1998:

- (1) the Board will hear from counsel on the issue of whether or not, having regard to the declaration made under section 66 of the Act, there is any bar to the applications for certification brought by the USWA; and,
- (2) if the Board determines that the applications are not barred, I will hear from counsel as to whether or not the ballots should then be counted, or whether there are any other issues which should be resolved prior to the count.

52. The parties should attend at the hearing prepared for a count to be taken that day, should the Board decide to make such a direction during the course of the hearing.

0096-98-PS; 0519-98-PS Mississauga-Queensway Hospital, Applicant v. Association of Allied Health Professionals: Ontario; Ontario Public Service Employees Union; Canadian Union of Public Employees, Responding Parties v. The Health Care Council of Ontario (LIUNA), on its own behalf and on behalf of its constituent unions and the Practical Nurses Federation Ontario, Intervenor; Canadian Union of Public Employees, Applicant v. Mississauga-Queensway Hospital, Ontario Nurses' Association, Ontario Public Service Employees' Union and Practical Nurses Federation of Ontario, Responding Parties v. Association of Allied Health Professionals: Ontario, Intervenor

Public Sector Labour Relations Transition Act - AAHP:O and OPSEU asking Board to dismiss or defer employer's application under Public Sector Labour Relations Transition Act on ground that application premature - Unions' request dismissed

BEFORE: *Robert Herman*, Alternate Chair.

DECISION OF THE BOARD; July 30, 1998

1. These are applications under the *Public Sector Labour Relations Transition Act, 1997*.
2. At the consultation into these matters, the Board first considered the objection raised by the Association of Allied Health Professionals: Ontario (AAHP:O) and OPSEU, that the application with respect to the paramedical bargaining unit (Board File #0096-98-PS) was premature, and that it ought to be dismissed or deferred by the Board, until some further restructuring events had taken place.
3. After hearing the submissions of the parties on this issue, the Board ruled orally at the hearing as follows:
 1. A number of reasons have been raised by AAHP:O and OPSEU as to why this application is premature, and ought either to be dismissed or deferred.
 2. I will comment only upon some of the reasons raised. The unions assert that where bargaining rights might be extinguished through a vote held pursuant to Bill 136, there must be a compelling operational reason for the Board to consider the application and it ought not to do so absent such a reason.
 3. With respect to this point, the Board agrees that existing bargaining rights are quite important, for a number of reasons. Bargaining relationships have been developed, and there are processes in place, which the parties have come to rely upon and depend upon, and which provide understood and anticipated norms of behaviour in the workplace. Disrupting these relationships, and these norms, will likely be disrupting.
 4. Nevertheless, the scheme and methodology of Bill 136 have the effect of disrupting existing bargaining relationships. The Act is designed to deal with restructuring events, and the disruption that such restructuring will inevitably bring. Generally speaking, reorganizations, mergers, amalgamations, transfers of programs, or other such matters, will necessarily cause disruption, and will necessarily cause problems for all workplace participants, whether employees, bargaining agents or employers.
 5. I am not persuaded that the predicted result of a vote (which is the statutorily created mechanism in Bill 136 for determining representation rights), where on the numbers it is likely to extinguish bargaining rights, should be a reason to delay moving forward with the application. Access to Bill 136, and the ability to file an application and have it considered by the Board do not depend upon a demonstration of a compelling reason for the Board to proceed. Again, as a general proposition the restructuring itself, given the

provisions of Bill 136, provides sufficient reason for an application to be considered by the Board.

6. It was also suggested that the Framework Agreement, entered into between the parties, provides sufficient guidelines and rules for assisting the parties in restructuring, and that the Agreement obviates the need for the instant application to proceed at this time.
7. While the Framework Agreement does provide meaningful assistance to the parties, many of the problems arising from restructuring would nevertheless remain unresolved by that Agreement.
8. It was also argued that the anticipated further directions to be issued by the Health Services Restructuring Commission, that might effect the provision of laboratory services in the area, rendered the application premature. In addressing this point, it must be kept in mind that the issue before the Board at this stage is the question of prematurity, and not the question of the bargaining unit configuration. Nevertheless, it does not appear likely that these future events, whatever they are, would affect the bargaining unit configuration issues in this application. The arguments for concluding that there should be a bargaining unit of only laboratory employees remain for the most part the same, regardless of any decision effecting the provision of those services.
9. AAHP:O and OPSEU have raised legitimate concerns; nevertheless, the Board remains satisfied that it is appropriate to proceed with these applications, and it will now do so.

4. After delivering the oral decision set out above, the parties met and were able to resolve all matters remaining in dispute in the two applications. For the paramedical bargaining unit, the following Minutes of Settlement were filed:

In the Matter of an Application to the Ontario Labour Relations Board

Board File #0096-98-PS

Between:

Mississauga-Queensway Hospital

("Hospital")

and

Association of Allied Health Professionals

("AAHPO")

Ontario Public Service Employees Union

("OPSEU")

Canadian Union of Public Employees

("CUPE")

Minutes of Settlement

AAHPO, and OPSEU agree with the Hospital to the following terms.

1. The paramedical bargaining unit description shall be as set out in Appendix A.
2. The paramedical vote will be held on September 16, 1998. The vote will be counted on the same day as the vote is held.

3. During the three weeks leading up to the vote, each of OPSEU and AAHPO will be given access as follows for the purposes of providing information to paramedical employees:
 - (i) Two meetings at each site, up to a maximum duration of 2 hours per meeting, to be scheduled subject to date and time availability of space at each site, it being understood that the meetings shall not interfere with the operations of the hospital.
 - (ii) Each of OPSEU and AAHPO may distribute leaflets to staff at the East and West Staff entrances (or any other entrance excepting only the Emergency entrance) on two days during the week and one day during the weekend (provided that such leafletting shall be limited to two consecutive hours in the P.M. in the three weeks prior to the vote). It is understood that such leafletting will not interfere with any person's entrance or departure from the Hospital and that no person shall be delayed by any such leafletting. It is understood that OPSEU and AAHPO will not leaflet on the same day and will agree between themselves on the days they leaflet.
 - (iii) OPSEU and AAHPO may post notices of the meetings at both sites, subject to Hospital approval of the notices.
 - (iv) OPSEU and AAHPO may deliver to the mail room, of each site, on one occasion, printed material addressed to paramedical employees by name and department and such material will be delivered through the internal mail system.
 - (v) Should a "run-off" vote be required, the above shall be extended proportionally to the time until the 2nd vote.
4. The Hospital shall provide to OPSEU and AAHPO a copy of the voter's list by July 31st, 1998.

Dated at Toronto, Ontario, on July 24, 1998.

"E. Ogibowski"
OPSEU

"Lynn Keays"
AAHPO

"Susan A. Lewis"
THE HOSPITAL

APPENDIX A

July 24, 1998

The Hospital's proposal for a paramedical unit is as follows:

"The Hospital recognizes all paramedical employees of the Mississauga-Queensway Hospital, in the Region of Peel and in the City of Toronto, save and except supervisors, persons above the rank of supervisor, students performing work as part of the co-operative high school program, students performing work as part of an internship or apprenticeship as part of a university program, students performing work as part of a placement from a community college program, students employed during the school vacation period and employees in any bargaining unit for which any trade union holds bargaining rights.

For the purposes of clarity, the term "paramedical" includes occupational therapists, speech therapists, speech pathologists, physiotherapists, therapeutic and administrative dieticians, registered and non-registered pathological technologists, radiological technologists (radiography), radiological technologists (nuclear medicine), registered and non-registered respiratory technologists, registered

and non-registered EEG, ECG and ophthalmology technicians, registered and non-registered ultrasound technologists, glaucoma technicians, ear, nose and throat technicians, cardiovascular technicians, electro-encephalographists, electrical shock therapists, laboratory technicians, laboratory assistants, electronic technicians, psychometrists, pharmacists, pharmacy technicians, psychologists, remedial gymnasts, medical records librarians, social workers, child care workers, nutritionists, dental health educators and bio-medical technicians.

Note:

The parties request that the Board remain seized of the issue of whether the position of biomedical technologist is a paramedical employee and should therefore be in the bargaining unit. It is understood that the votes of this individual will be segregated.

"Susan A. Lewis"
HOSPITAL

"E. Ogibowski"
OPSEU

"Lynn Keays"
AAHP:O

5. For the service bargaining unit, the following Minutes of Settlement were filed:

IN THE MATTER OF AN APPLICATION TO THE ONTARIO LABOUR RELATIONS BOARD

BOARD FILE #0519-98-PS

Between

Canadian Union of Public Employees

("CUPE")

and

Mississauga-Queensway Hospital

("The Hospital")

Ontario Nurses' Association Practical Nurses' Federation of Ontario

("H.C.C.O.")

Ontario Public Service Employees Union

and

Association of Allied Health Professionals

MINUTES OF SETTLEMENT

CUPE and H.C.C.O. and The Hospital agree to the following terms:

1. The service bargaining unit description shall be as set out in Appendix "A".
2. The service vote will be held on August 19th, 1998. The vote will be counted on the same day as the vote is held.
3. During the three weeks leading up to the vote, each of CUPE and H.C.C.O. will be given access as follows for the purposes of providing information to service employees:
 - (i) Two meetings at each site, up to maximum duration of two hours per meeting, to be scheduled subject to date and time availability of space at each site, it

being understood that the meeting shall not interfere with the operations of The Hospital.

- (ii) Each of CUPE and H.C.C.O. may distribute leaflets to staff at the east and west entrances (or any other entrance excepting only the emergency entrance) on two days during the week and one day during the weekend (provided that such leafletting shall be limited to 2 consecutive hours in the A.M. and 2 consecutive hours in the P.M. in the 3 weeks prior to the vote. It is understood that such leafletting will not interfere with any person's entrance or departure from The Hospital and that no person shall be delayed for any such leafletting. It is understood that CUPE and H.C.C.O. will not leaflet on the same day and they will agree between themselves on the days they leaflet.
 - (iii) CUPE and H.C.C.O. may post notices of meetings at both sites, subject to Hospital approval of the notices.
 - (iv) CUPE and H.C.C.O. may deliver to the mail room of each site on one occasion printed material addressed to service employees by name and department and such material will be delivered through the internal mail system.
4. The Hospital shall provide to CUPE and H.C.C.O. a copy of the voters' list by July 31, 1998.
 5. It is agreed that the "Health Care Council of Ontario (LIUNA)" will appear on the ballot *instead* of Practical Nurses' Federation of Ontario. CUPE will also appear on the ballot.

Dated at Toronto, Ontario on July 24, 1998.

"Heidi Hunter"
H.C.C.O.

"John Elder"
CUPE

"Susan A. Lewis"
The Hospital

CUPE/HCCO

Appendix A

July 24/98

"All employees of the Mississauga-Queensway Hospital in the City of Toronto and Regional Municipality of Peel save and except professional medical staff, registered and graduate nurses; graduate and undergraduate pharmacists; graduate and undergraduate dieticians; paramedical staff; supervisors; coordinators and other persons who exercise managerial functions; security guards and office and clerical staff.

For purposes of clarity, paramedical staff include the following:

Unregistered ECG technician, laboratory assistant/technician, physiotherapy assistant/technician, pharmacy technician, registered ECG technician, non-registered X-ray technologist, non-registered EEG technician, medical laboratory technologists, registered EEG technicians, chiropodist (orthopaedic technologists), registered X-ray technologists, registered nuclear medicine technologists, registered respiratory therapists, registered ultrasound technologists, medical social worker, crisis intervention worker, dietician, psychometrists, physiotherapists, occupational therapists, speech pathologist, licensed pharmacists, echocardiography technologists, and audiologists, ophthalmology assistant, pathology assistant, child and youth worker, recreation therapist, vestibular technician, child life specialist, behavioural therapists, infant development worker, Leader 1-group therapy, (lab samplers), occupational therapy assistant/technician, case manager, discharge planner, team leader (NPRS/lab), day treatment therapist, patient-care technician, morgue attendant."

6. At the hearing, the parties were directed to comply with all the terms of their respective Minutes of Settlement.

7. Having further regard to the Minutes of Settlement, the Board determines that there should be a paramedical bargaining unit as described in Appendix A of the Minutes of Settlement filed in Board File No. 0096-98-PS. That bargaining unit contains an extensive Clarity Note, and the Board notes the understanding of the parties, and the Board, that the Clarity Note is not intended to be, nor is it, exhaustive.
 8. The Board will remain seized with respect to the issue of whether the position of biomedical technologist falls within the paramedical bargaining unit. The votes of any one in this category will be segregated, unless the parties otherwise agree, or pending further decision of the Board.
 9. A vote is to be held in the paramedical bargaining unit, on September 16, 1998, with the ballots to be counted on the same day.
 10. On the ballot shall be AAHP:O, OPSEU and a "no union" option.
 11. With respect to the service bargaining unit (Board File No. 0519-98-PS), the Board determines that there shall be a service bargaining unit as described in Appendix A to the Minutes of Settlement filed in that application.
 12. A vote in the service unit will be held on August 19, 1998, with the ballots to be counted on the same day.
 13. The candidates on the ballot shall be the Health Care Council of Ontario (LIUNA) and CUPE.
 14. Finally, the Mississauga-Queensway Hospital is directed forthwith to post copies of this decision at locations where it is likely to come to the attention of potential voters, and to keep this decision posted until September 17, 1998.
 15. These matters are referred to the Manager of Field Services, to administer, conduct, and count the votes, and for all other relevant purposes.
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0622-98-G International Brotherhood of Electrical Workers, Local Union 1788, Applicant v. **Ontario Hydro** and Electrical Power Systems Construction Association, Responding Parties v. International Brotherhood of Painters and Allied Trades District Council No. 46, Intervenor

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Timeliness - Employer objecting to consideration of union's grievance by Board on grounds that grievance untimely, that grievance is really a disguised jurisdictional dispute complaint, and that challenge to assignment of work has already been referred by applicant union to Canadian Plan for Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan") - Board finding portion of grievance untimely and striking it out - Board agreeing that the grievance constitutes a jurisdictional dispute and that the dispute had already been referred to the Plan - Board deferring consideration of grievance pending resolution of jurisdictional dispute under the Plan

BEFORE: *Christopher J. Albertyn*, Vice-Chair, and Board Members *J.G. Knight* and *A. Haward*.

APPEARANCES: *Andrea Bowker, Harry Tomsett and Jack Reid* for the Applicant; *M. Patrick Moran and Barry Roberts* for the Responding Parties; *Laurence Arnold and Bill Nicholls* for the Intervenor.

DECISION OF THE BOARD; July 16, 1998

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

The issue

2. The responding party ("Ontario Hydro") and the intervenor ("the Painters") have three preliminary objections to the application. They argue that the grievance is untimely; secondly, the grievance is a chimera for what is really a jurisdictional dispute over work assignment; and thirdly, the challenge to the assignment of work by the applicant union ("Local 1788") has already been referred to the Canadian Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("the Plan") for determination and the grievance should yield to that process.

Facts

3. A mark-up meeting occurred on July 7, 1997 concerning work to be done on an engraving machine then recently acquired by Ontario Hydro at its Pickering Nuclear Generating Station. At that meeting Ontario Hydro proposed to assign the work to the Painters, rather than to members of Local 1788. In a letter dated July 21, 1997, faxed on July 22, 1997 Ontario Hydro informed Local 1788 that the work was to be assigned to the Painters. The work commenced during or about August or September 1997. It is ongoing.

4. On January 21, 1998 Local 1788 filed a grievance concerning an alleged violation of Section 401(b) of the Principal Agreement between the Electrical Power Systems Construction Association ("EPSCA") (representing Ontario Hydro) and the IBEW Electrical Power Systems Construction Council of Ontario (representing Local 1788, among others) ("the collective agreement"). The grievance reads:

a) Nature of Grievance and Date of Occurrence:

401(a) work assignment

Change of work assignment from the I.B.E.W. to Brotherhood of Painters, Decorators and Paper Hangers of America with respect to the fabrication of Lamacoid Labels contrary to the procedural rules for the plan for settlement.

b) Remedy or Correction Requested:

1. Reassignment of work to the I.B.E.W.

The grievance concerns the assignment of work to the Painters which Local 1788 contends belongs to its members.

5. On the same date, January 21, 1998, Ontario Hydro referred the assignment as a jurisdictional dispute to the Plan.

6. All of the parties are party to the Plan and none suggested that it was not bound by it.

7. On February 3, 1998 Ontario Hydro responded to the grievance, as follows:

This grievance is not being accepted since it is a jurisdictional dispute. As outlined in Article 401(c) of the collective agreement, jurisdictional disputes are not subject to the grievance process.

8. On May 13, 1998 Local 1788 referred the grievance to the Board. The grievance is slightly expanded from its original form. Besides Local 1788's complaint concerning the assignment of the work to the Painters, Local 1788 grieves that Ontario Hydro ought never to have held the mark-up meeting on July 7, 1997. The grievance filed with the Board contends that the holding of a mark-up meeting is precluded when the assignment of work is by the same employer, for the same work at the same site. In those circumstances, contends Local 1788, no mark-up meeting may be held.

Relevant sections of the collective agreement

9. The collective agreement contains the following relevant sections:

401 A. The Employer who has the responsibility for the work shall make a proposed assignment of the work involved. The Employer shall be responsible for providing copies of proposed assignments to the Union (International Office and Local Union Office). The Employer will specify a time limit for the Union to submit evidence supporting its claims. The Employer will evaluate all evidence submitted and make a final assignment of the work involved. This final assignment will be in accordance with the procedural rules established by the plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The Employer will advise the Union of the final assignments prior to the work commencing.

The EPSCA representative will record the proposed assignments and jurisdictional claims and forward a copy of them within fifteen (15) working days to the Union (International Office and Local Union Office).

The parties recognize that circumstances may arise, particularly with discovery and emergency work, where the process set out above may not be practical or possible. **However, reasonable effort will be made by the Employer to adhere to the jurisdiction of the IBEW. When a jurisdictional dispute exists between unions and upon request by the IBEW, the Employer shall furnish the IBEW International Office a signed letter from a duly authorized official of the company on employer stationery, stating whether or not the Union was employed on specific types of work on a given project. The Employer agrees to consider evidence of established practices within the construction industry generally when making jurisdictional assignments.**

A markup process will be utilized when an Employer intends to perform work on a project site*. The purpose of this markup process is to indicate to the Union the work which is planned to be carried out by the Employer in order to minimize the potential for jurisdiction disputes.

When work is to be performed on a project site* and it meets the following criteria; same employer, same work, same project site*, the markup process will not be required. This procedure shall not preclude the Union's right to contest previously disputed work.

When an Employer has work that is less than a 3 week duration and there are ten (10) or fewer employees covered by EPSCA Collective Agreements employed on this specific work, the Union will be notified of the scope of work and the Employer's proposed work assignments. The Union will have two weeks from the date of notification to submit jurisdictional claims and supporting evidence to the Employer for consideration. The Employer will notify the Union of the final work assignments prior to the commencement of the work.

All work that does not meet the criteria set out in paragraphs 2 and 3 above, will be reviewed and assigned at a markup meeting.

EPSCA will provide written notice to the Union (International Office and Local Union Office) as far in advance as possible of markup meetings. The Union may attend these markup meetings, and every effort will be made to settle questions of jurisdiction before the work is expected to commence.

*For the purposes of this Article, Bruce Nuclear Power Development (BNPD) will be considered a single project site.

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- A. The jurisdiction of the Union shall be that jurisdiction established by agreements between International Unions claiming the work or decisions of record recognized by the AFL-CIO for the various classifications and the character of work performed.
- B. In the event that a jurisdictional dispute arises over a work assignment, the Employer will make an assignment for the work to be done. If any Union or Unions disagree with such a work assignment, the parties will settle such jurisdictional dispute in accordance with procedure as outlined by the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry, or any successor thereto.
- C. In the event that a jurisdictional dispute cannot be settled on a local basis by the Unions involved, it shall be submitted to the International Unions involved for settlement without permitting it to interfere in any way with the progress of the work at any time. In the event the dispute is not settled by the International Unions involved, it shall then be submitted to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry for resolution. The International Representative of the Union will advise EPSCA in writing of his intent to submit a jurisdictional dispute to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry and will identify in detail the work in question. The decision of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry will be final and binding to the parties to this Agreement.
- D. EPSCA shall have direct recourse to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry when the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry has under its consideration a dispute involving the assignment of work being done by employees who are covered by this Agreement.

1300 Grievances

- A. Grievances within the meaning of the grievance and arbitration procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of this Agreement. In the event of any dispute concerning the meaning or application of any provision of this Agreement or a dispute concerning an alleged violation of this Agreement, there shall be no suspension or disruption of work, but such dispute shall be treated as a grievance and shall be settled, if possible, by EPSCA and the Union. In the interests of expediting the procedure, the parties shall process grievances in the following manner.

B. PRELIMINARY DISCUSSION

Disputes arising out of the interpretation or alleged violation of this Agreement shall, if possible, be settled by discussion between the employee and/or his steward and the employee's supervisor.

C. FIRST STEP

If a dispute cannot be resolved by this method, the Accredited Union Representative for the Union may file a formal grievance on the prescribed form with the Manager of Construction. Such grievance shall be filed within fifteen (15) working days of the alleged grievous act.

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As stated, Local 1788's grievance letter of January 21, 1998 concerns Section 401A of the collective agreement.

The timeliness of the grievance

10. Section 1300C of the collective agreement requires that a grievance be “filed within 15 working days of the alleged grievous act”. That period can be extended by the Board on good cause and the Board can condone an untimely grievance. For good reason the Board will allow a union to pursue an otherwise untimely grievance.

11. There are two parts to the grievance: the complaint concerning the assignment of the work on the engraving machine to the Painters; and the holding of the mark-up meeting. The latter portion was not contained in the original grievance, but it is part of the grievance which has been referred to the Board.

12. The timeliness issue affects the two parts of the grievance in different ways. The portion of the grievance concerning the allegedly incorrect assignment (“the first portion”) is an on-going grievance. The portion concerning the holding of the mark-up meeting (“the second portion”) is a complaint which is fixed in time. The second portion arose on June July 7, 1997. It should have been brought as a grievance within 15 working days of that event.

13. The first portion of the grievance is on-going, hence the timeliness of its filing is less significant. It could have been filed earlier; it could also have been filed later, given Local 1788’s claim is that there is a continuing violation of the assignment provisions of the collective agreement. Therefore the timeliness objection to the grievance does not strike out the first portion of the grievance.

14. As regards to the second portion of the grievance, the explanation given by Local 1788 for the delay in bringing the grievance is that it was engaged in informal discussions with Ontario Hydro management concerning the grievance, a process contemplated in Section 1300 of the collective agreement. That is not a sufficient reason for a delay of the magnitude involved in this case. The collective agreement contemplates some informal discussion, but that, on its own, does not justify a departure from the timeliness rule that grievances be filed within 15 working days. If progress is being made in the informal discussions and they should continue, then Local 1788 can get an extension of time from management, alternatively they can file their grievance on the understanding that they do so for the purpose of complying with the timeliness requirement of the grievance procedure, and informal discussions can continue unaffected. In our view there is no reason why the second portion of the grievance is not struck out by the timeliness provision of the grievance procedure. Accordingly, that portion of the grievance is struck out. What remains is the complaint concerning the assignment of work.

Is the grievance really a disguised jurisdictional dispute?

15. Local 1788 contends that the terms of its collective agreement with Ontario Hydro are such that if there is to be a work assignment and that work is the same as work which has always in the past been done by its members at the same site, then the work must be assigned to it. For that reason Local 1788 argues that what is involved in this application is a grievance alleging a wrongful work assignment, in violation of the collective agreement, and not a jurisdictional dispute.

16. This argument has the weakness of seeing the situation only for the perspective of Local 1788. What is at stake is that both Local 1788 and the Painters have a claim to the work. The assignment made by Ontario Hydro in June 1997 was done because Ontario Hydro was satisfied that the work belonged to the Painters. It conceived the situation to be that it was bound by its agreement with the Painters to assign the work to its members.

17. The situation involves a conflict between competing obligations in different collective agreements. Under Local 1788's collective agreement and under that of the Painters, Ontario Hydro has an obligation to assign certain work to both unions. There are circumstances, such as those which inform this case, when it must elect where its assignment obligation lies. In such circumstances, Ontario Hydro must choose which union should get the work. It made that election in June 1997. When a union is not happy with the assignment, and it claims that the assignment should have been made differently, the remedy available to the grieving union is to refer its complaint as a jurisdictional dispute, which is resolved either by the Board or under the Plan.

18. The substance of what remains of the grievance is whether the work which Ontario Hydro assigned to the Painters in July 1997 ought to have been assigned to Local 1788. That is exactly what constitutes a jurisdictional dispute. The remedy requested by Local 1788 is precisely what can be expected of a successful jurisdictional dispute challenge: they want the work re-assigned to their members.

Should the matter be resolved by the Plan?

19. The Board has jurisdiction to deal with the substance of Local 1788's complaint as a jurisdictional dispute. Local 1788 is entitled to bring such an application. However, the parties have resolved to refer jurisdictional disputes to the Canadian Plan for the Settlement of Jurisdictional Disputes. Both remedies are available to the parties: they are concurrent. In circumstances where an alternative procedure for the resolution of a jurisdictional dispute is available and has been initiated by one of the parties and agreed to by the remaining parties, and an application has not been made to the Board for relief, the Board should be agreeable to staying the grievance pending the outcome of such alternative mechanism. In other words, the Board should stay its own proceedings to allow the parties to pursue their chosen remedy.

20. The following considerations are relevant to our determination: the Board has not yet received a jurisdictional dispute reference; a reference to the Plan in respect of the substance of this application has already been made to the Plan; the plan is now readily accessible to the parties, being located in Canada, with a Canadian panel of experts from the construction industry to arbitrate the matters; the Board generally encourages parties to pursue their own dispute resolutions procedures rather than to make use of public resources, like the Board. (See *Delta Catalytic Industrial Services Limited* [1996] OLRB Rep. March/April 233; *Ryco Alberici* [1997] OLRB Rep. September/October, 926; *Asea Brown Boveri Inc.* [1996] OLRB Rep. March/April 185). These considerations strongly suggest that the Board should defer proceeding with the grievance pending the resolution of the jurisdictional dispute under the Plan.

21. In light of these considerations and the Board's approach to these matters, we are satisfied that the substance of this application - the jurisdictional dispute - should be dealt with by the Plan.

22. The application is adjourned *sine die* for a period not exceeding one year. Unless within that time either party requests that the Board proceed with the matter, it will be terminated.

3514-97-U The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers, Jerry Coelho, and Tom Oldham; International Union of Bricklayers and Allied Craftworkers, Local 1 and Kerry Wilson; International Union of Bricklayers and Allied Craftworkers, Local 2 and Danilo Buttazzoni; International Union of Bricklayers and Allied Craftworkers, Local 5 and John Haggis,

Applicants v. International Union of Bricklayers and Allied Craftworkers, John T. Joyce, John J. Flynn, Frank Stupar, James Bowland and Michael Carlander and International Union of Bricklayers and Allied Craftworkers Local Union Officers and Employees Pension Plan of Canada, Responding Parties

Construction Industry - Unfair Labour Practice - OPC and others alleging that International union violating Bill 80 provisions of the Act concerning administration of employment benefit plans - Board finding that the relevant trust document creates separate Canadian and American pension plans, and that the Canadian Plan is an employment benefit plan governed by section 150 of the Act - Board finding and declaring that International union violating section 150 by refusing to recognize right of local unions to appoint trustees to the Canadian Plan - Board declining to inquire into allegation that International union violating section 149 of the Act by interfering with local trade union without just cause - Board exercising discretion against inquiring into section 149 allegation because it would not issue remedy other than declaration and because ruling on the section 149 application would not be conducive to good labour relations

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*

APPEARANCES: *L. A. Richmond, J. Coelho, T. Oldham, K. Wilson, D. Buttazzoni* and *J. Haggis* for the applicants; *Donald K. Eady, Joel Freedman* and *Graeme Aitken*, for the responding parties.

DECISION OF THE BOARD: July 15, 1998.

I. Introduction

1. This is an application brought before the Board pursuant to section 96 of the *Labour Relations Act, 1995* (hereinafter referred to as "the Act"). This proceeding came on for hearing before this panel of the Board on March 31, 1998, and was argued on that same date on the basis of facts and documents which were agreed to amongst the parties.

2. The statutory provision around which this proceeding revolves is section 150 of the Act, which deals with the administration of "employment benefit plans", and which was part of the "Bill 80" amendments made to the Act in 1993. Section 150 of the Act reads as follows:

(1) If benefits are provided under an employment benefit plan primarily to members of one local trade union or to their dependents or beneficiaries, the local trade union is entitled to appoint at least a majority of the trustees who administer the plan, excluding the trustees who are appointed by employers.

(2) If benefits are provided under such a plan primarily to members of more than one local trade union or to their dependents or beneficiaries, those local trade unions are entitled together to appoint at least a majority of the trustees who administer the plan, excluding the trustees who are appointed employers.

(3) If, in the circumstances described in subsection (2), benefits are provided to members outside of Ontario or to their dependents or beneficiaries, the local trade unions are entitled together to appoint that proportion of the trustees (excluding trustees appointed by employers) that corresponds to the proportion that the members in Ontario of the local trade unions bear to the total number of members participating in the plan.

(4) Subsections (1), (2) and (3) apply despite any provision to the contrary in any agreement or other document.

(5) Unless otherwise agreed by the interested local trade unions, the appointment of trustees under subsection (2) or (3) shall be determined by a majority vote of those local trade unions voting, with each local trade union being entitled to cast a single ballot.

(6) In this section, "employment benefit plan" means a plan that provides any type of benefit to an individual or his or her dependents or beneficiaries because of the individual's employment or his or her membership in a trade union and includes a pension plan or another arrangement whereby money is contributed by or on behalf of the individual for retirement purposes.

The applicants also assert that the conduct of the responding parties in this proceeding constitutes a violation of section 149 of the Act.

3. As noted above, the factual background underlying this application was not in dispute. The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (hereinafter "the OPC") is a council of trade unions comprising all of the local unions of the International Union of Bricklayers and Allied Craftworkers (hereinafter "the International") in Ontario. The applicants styled as Locals 1, 2 and 5 are each local unions of the International, and a member local union of the OPC. The business managers of Locals 1, 2 and 5 are Kerry Wilson, Danilo Buttazzoni and John Haggis, respectively.

4. The applicants assert that in September, 1997, Messrs. Buttazzoni, Haggis and Wilson were properly elected as trustees to an employment benefit plan, in accordance with section 150 of the Act, and that their election has not been recognized by the International. In fact, it is not denied that on or about October 2, 1997, Messrs. Buttazzoni, Haggis and Wilson wrote to John Joyce, the President of the International (and also a member of the International's Executive Board) requesting, amongst other things, a meeting in Toronto, and certain information relating to the Local Union Officers and Employees Pension Plan. There was no reply to that letter. A further letter, dated November 4, 1997, was sent to Mr. Joyce by applicants' counsel. Mr. Joyce did respond to that letter, indicating that he was of the view that the three Ontario locals did not have the right to appoint any trustees to the pension plan. This application followed.

5. There are two core issues in dispute between the parties. The first issue relates to the nature of the pension plan itself. It is the applicants' view that there are, in fact, two pension plans - one that relates to Canada, and one that relates to the United States. The applicants' claim relief under the Act only with respect to the plan that relates to Canada. The responding parties, on the other hand, assert that there is, in reality, only one plan, and that it applies to members in both Canada and the United States. Accordingly, the responding parties urge the Board to apply section 150 - if at all - in that context.

6. We say "if at all" because the responding parties argue that the pension plan itself ought not to be considered to be an "employment benefit plan" for the purposes of section 150 of the Act. They argue that section 150 of the Act was never intended to cover the type of plan in question before the Board, and that the Board ought not to interpret the legislation to encompass the plan in place between the parties. The applicants, on the other hand, claim that the plan in question fits neatly within the definition of "employment benefit plan" contained within the Act, and therefore that section 150 ought to apply to the parties.

7. In our view, it is appropriate to deal with the question of the nature of the pension plan first, and accordingly we do so, immediately below.

II. The Nature of the Pension Plan

8. At the outset, it should be noted that the plan in question here is one created for the benefit of local union officers and employees of the local unions, and not for the membership of the locals

generally. The plan provides, amongst other things, retirement and disability payment benefits to individuals who were, at relevant times, salaried officers or employees of a local union, conference, or related organization of the International, or to their dependents or beneficiaries.

9. There is no dispute that the genesis of the pension plan in question was an “Agreement and Declaration of Trust” dated April 15, 1969, entered into between the International and the four original trustees of the plan. This document was subsequently amended in May, 1983, and is now referred to as the “Restated Agreement and Declaration of Trust”. For the purposes of this decision we will refer to the Restated Agreement and Declaration of Trust as “the trust document”.

10. The trust document creates the “International Union of Bricklayers and Allied Craftsmen Local Officers and Employees Pension Plan”, which is defined in the trust document, for the sake of convenience, as the “Local Officers and Employees Pension Fund”. For the purposes of this decision, we will refer to this pension plan as “the pension plan”. I note here, as did counsel for the applicants at the hearing, that at times the trust document (and others) do not distinguish between a pension “plan” and a pension “fund”, which are two entirely different things. In fact, even a brief review of the trust document discloses that it is not particularly well written, inasmuch as it contains terms which one would expect to find defined in the document but, in fact, are not.

11. Accordingly, we have found the interpretation of the trust document to have been difficult and, at times, somewhat frustrating. Notwithstanding that, it appears to us that the trust document did not, in and of itself, initially establish two separate plans (i.e. a Canadian Plan and an American Plan) but rather one plan, the pension plan, which was envisaged as applying to local union officers and employees of the local unions in both the United States and in Canada.

12. There are some examples of such an intention contained in the trust document itself. Section 1.2 of the trust document defines the term “Local Union, Conference and District Council” as meaning “a Local Union, a State or Provincial Conference ... affiliated with and in good standing with the International Union in accordance with the provisions of the International Union’s Constitution”. The Constitution of the International identifies “Provincial Conferences” as a constituent element of the International, and describes how local unions in a province such as Ontario can create a provincial conference. Accordingly, then, it must have been anticipated by the parties that the trust document (and the pension plan created therein) would apply to union officials and employees of locals in Ontario.

13. We are supported in that conclusion by reference to the initial trust document (i.e. the trust document as initially approved on April 15, 1969). This document was provided to the Board in the bound materials immediately behind the plan document most recently filed with the Pension Commission of Ontario (which we will discuss in more depth below). We note that that the initial trust document defines the concept of “Local Unions and Conferences” without reference to the concept of a “Provincial Conference”, as the 1983 restatement does. The conclusion that we draw from the state of the current trust document is that it was anticipated that union officers and employees of Canadian locals would have access to the pension plan created from the trust document.

14. Interestingly, and somewhat cryptically, section 8.1 of the trust document speaks to the question of the law applicable to the document itself. It states:

This Trust is created and accepted in the District of Columbia, and all questions pertaining to the validity or construction of this Trust Agreement and of the acts and transactions of the parties hereto shall be in accordance with the laws of the District of Columbia.

With respect to all matters pertaining to a Plan or Plans adopted for Employees of Employers in Canada, the Province of Ontario shall be deemed the situs of the Trust Fund; and all questions

pertaining to validity, construction and administration shall be determined in accordance with the laws of such Province.

We view this clause of the trust document as anticipating the future creation of “a Plan or Plans” relating specifically to Canada, within the framework of the trust document itself. It is extremely unusual (and therefore extremely unlikely) for the “applicable law” clause in one agreement to be made itself applicable to a future, separate document. We are of the view that this clause was seen as necessary to deal with the question of applicable law of “a Plan or Plans” arising out of the trust document itself.

15. Accordingly, we conclude that this provision reflects an expectation that, at some future date, the parties could create “a Plan or Plans” relating specifically to local unions in Canada. We also conclude that the trust document itself was intended by the parties to be applicable to the employees and officers of local unions in Canada.

16. The trust document establishes that the five persons who sit on the International’s Executive Board are the trustees of the pension fund. It is this facet of the trust document which has led to the filing of this application. The trust document also sets out, amongst other things, the powers and obligations of the trustees. Section 4.19 of the trust document, which deals with amendments to the pension plan, reads as follows:

The Pension Plan may be amended by the Trustees from time to time, provided that such amendments comply with the applicable sections of the Internal Revenue Code, all applicable federal statutes and regulations, the contract articles creating the Trust Fund, and the purposes as set forth in this Trust Agreement. Additionally, and not by way of limitation, the Trustees may amend the Pension Plan, in the future, or retroactively, where they deem it necessary to maintain the continuation of the Trust Fund’s tax exempt status or to preserve compliance with the then applicable Internal Revenue Code, applicable federal statutes, and any regulations or rulings issued with respect thereto.

There is no direct evidence before the Board that the trustees of the pension plan ever specifically utilized this provision with regard to their administration of the pension plan.

17. At the hearing, the Board was provided with two separate documents which appear to be plans. The first is entitled “International Union of Bricklayers and Allied Craftsmen Local Union Officers and Employees Pension Plan of Canada” (hereinafter “the Canadian Plan”). The document containing the Canadian Plan is said to reflect all amendments through January 1, 1993, and is stated to apply “to pensions awarded on and after January 1, 1987, and to people who become vested after that date”. The second document is entitled “International Union of Bricklayers and Allied Craftsmen Local Union Officers and Employees Pension Plan (U.S.)” (hereinafter “the American Plan”), and is stated to reflect all amendments and apply to pensions awarded “on and after January 1, 1989, and to people who become vested after that date”.

18. The Canadian Plan is registered with the Pension Commission of Ontario, in accordance with the *Pension Benefits Act* (R.S.O. 1990, c. P.8, as amended, hereinafter “the *PBA*”) as Plan No. C012900. It was not disclosed when the Canadian Plan was first registered with the Pension Commission. However, we note that the initial trust document dated April 15, 1969 (referred to above) has endorsed upon its face the number “12900”, which corresponds with the registration number given to the Canadian Plan by the Pension Commission. It is likely, therefore, that the initial trust document was filed, at some point, with the Pension Commission. However, we do not know when that filing occurred.

19. Counsel for both the applicants and the responding parties took the Board through the terms of the Canadian and American Plans. We do not intend to review, in any depth, the different clauses referred to by counsel. There is no dispute that the pensions and other benefits provided to employees and officers of local unions in Ontario are governed by the Canadian Plan, and, likewise, that the

pensions and other benefits to which employees and officers of local unions located in the United States are entitled are governed by the terms of the American Plan. It is evident from their respective provisions that the two Plans were intended to function in just that way. During the course of argument, counsel both suggested that at least one reason for the existence of the two documents was the different pension legislation in Ontario (the *PBA*) and the United States (the Employee Retirement Income Security Act of 1974, hereinafter "ERISA").

20. What is significant, for the purposes of this proceeding, is that the trustees of the Canadian Plan are identified in that plan as those persons designated as trustees in the trust document - that is, Messrs. Joyce, Flynn, Stupar, Bowland and Carlander, the individual responding parties and the five persons currently on the International's Executive Board. The applicants desire to dislodge three of these trustees, on the authority of section 150 of the Act. Section 150 of the Act makes reference to an "employment benefit plan". Counsel for the applicants argues that the Canadian Plan easily fits that definition. Counsel for the responding parties disagrees, arguing that the Canadian Plan and the American Plan are subsidiary plans to the larger pension plan created by the trust document. During the course of argument, counsel for the responding parties referred to both the Canadian and American Plans as "sub-plans" of the larger pension plan.

21. As evidence of this relationship, counsel for the responding parties made reference to a number of financial statements and auditors reports created on behalf of the pension plan. For example, the Financial Statements and Report of Independent Auditors for the year ended December 31, 1996 (the most recent financial statements available at the time of the hearing) make reference to only one pension plan, with American and Canadian net assets outlined separately. The auditor describes that plan as applying to officers and employees of both American and Canadian locals. Administrative costs are expended on behalf of both American and Canadian locals, and those allocated to Canadian operations are referred to in the statements as being allocated to "the Canadian segment". There are parallel references to "the United States segment" throughout the document. As well, the financial statements contain three schedules, each entitled "International Union of Bricklayers and Allied Craftworkers Local Union Officers and Employees Pension Plan". Two of the schedules outline the assets held and reportable transactions for the "United States segment" (apparently required by the U.S. Department of Labor Rules and Regulations for Reporting and Disclosure under ERISA), and a third reflects "Canadian Investments", or the investments in Canadian assets. This same basic structure is reflected by the financial statements and auditor's report for the year ended December 31, 1994 (the only other financial statements provided by the parties to the Board).

22. Having reviewed the documents and having considered the argument of counsel very carefully, we are of the view that there are currently two separate plans which arise out of the trust document, namely the Canadian Plan and the American Plan. The Canadian Plan is not a "subset" of the pension plan.

23. As noted above, the trustees of the Canadian Plan are the five individuals who compose the International's Executive Board. Arguably, this fact evidences that the Canadian Plan is merely part of the initial pension plan created by the trust document. However, it is evident that the Executive Board members of the International who comprised the trustees of the initial pension plan have, since 1983, created two plans where one previously existed. The Canadian Plan contains a large number of articles speaking to specific provisions contained in Canadian pension and tax legislation, which would have no bearing on pension obligations or rights in the United States. As observed above, the Canadian Plan was obviously created to deal with the unique pension and tax legislation applicable to pension and other plans created to benefit Canadians. This is highlighted by Section 5.09 of the Canadian Plan, entitled "Canadian Law", which states as follows:

Notwithstanding anything in this Plan, with respect to Covered Participants located in Canada, the Plan shall provide the benefits and be operated in accordance with the requirements of any applicable Federal or Provincial law.

24. What we consider to be largely determinative of this issue is the Certification provision of the Canadian Plan, which is contained on the last page of the document, when read in context of section 1.7 of the initial trust document. The certificate is signed by two of the trustees at that time (Messrs. Flynn and Carlisle), and reads as follows:

CERTIFIED, the attached is true and correct copy of the Pension Plan (as amended and restated effective January 1, 1993) adopted by the Board of Trustees of the International Union of Bricklayers and Allied Craftsmen, Local Union Officers and Employees Pension Plan of Canada, at a meeting held on 29 September, 1992.

The certificate was executed by Messrs. Flynn and Carlisle on June 25, 1993, and it would appear from the face of the Canadian Plan document that it was filed with the Pension Commission of Ontario on June 29, 1993 - two business days later. We point out here that the last page of the American Plan was missing from the documents provided by counsel, and therefore we are unable to compare the Canadian and American Plans in this regard.

25. Section 1.7 of the initial trust document defines the term "Plan" or "Pension Plan" for the purposes of the trust document and reads as follows:

The term "Plan" or "Pension Plan" means the Plan document together with any amendments or interpretations thereof duly adopted by the Trustees.

It is evident to us, from the certificate appended to the Canadian Plan, that on September 29, 1992 the trustees as identified by the trust document met and adopted a specific Canadian plan speaking to pension and other obligations for local union officials and employees of local unions in Canada. Utilizing the authority given to them pursuant to section 1.7 of the trust document, the trustees have, by way of amending the initial pension plan, altered the structure of the pension plan applicable to employees and officers of local unions by creating a plan specifically tailored to Canadian law. Furthermore, the trustees have filed the Canadian Plan with the Pension Commission of Ontario, identifying it as the plan now applicable to employees and officers of its related local unions in Ontario.

26. There can be no doubt, from the documentary materials filed with the Board, that the trustees have treated the Canadian Plan as separate from the American Plan. Counsel for the applicants filed with the Board various memoranda from the trustees addressed to "Canadian Plan Participants" or "Plan Participants in Canada" that deal with benefit improvements and plan amendments. These documents, some dated as early as 1987, suggest (but do not explicitly state) that what we have described here as "the Canadian Plan" may have initially been established well before the September, 1992 meeting of trustees described above. In our view, the initial date of the Canadian Plan is not relevant, for it is clear that, at all relevant times for the purposes of this proceeding, the Canadian Plan was effective.

27. In further support of our conclusion, we make reference to the Annual Information Return filed by the International with the Ontario Ministry of Finance as required by the Pension Commission of Ontario. The latest return filed by the International is dated September 24, 1997, and identifies that all of the required contributions to the Canadian Plan were made during the 1996 calendar year. The form contains a breakdown of membership information at the end of the reporting period (i.e. as at December 31, 1996). The author of the form identifies 36 male and 10 female members of the plan, none of which is identified as being resident outside of Canada. (In fact, the parties agreed at the hearing that the Canadian Plan is applicable to 46 employees and officers of local unions in Canada, 28

of which reside in Ontario.) It is evident that the author of the Annual Information Return was of the view that the Canadian Plan was applicable to officials and employees working for unions affiliated with the International in Canada.

28. In these circumstances, we have no hesitancy in concluding that the Canadian Plan is the plan that is subject to the requirements of section 150 of the Act. It is true that the financial statements and auditor's report identify one plan, and appears to reflect one common pool of assets and liabilities (though "segmented" to reflect Canadian and American assets and liabilities) and common administration. There may well be some reason unique to American pension and benefit legislation that this is so. Or it may be merely administratively efficient to do so. It suffices to say that we are not satisfied that the mode of presentation of financial information by an auditor on financial statements or a common administrative infrastructure ought to lead us to conclude that there is but one pension plan, and that the Canadian Plan is but an included portion of the greater whole, particularly in light of the structure of the Canadian Plan and the other factors identified above.

III. Is the Canadian Plan an "Employment Benefit Plan"?

29. As noted above, the Board entertained the submissions of the parties on the question of whether the provisions of section 150 of the Act apply to the Canadian Plan. Although we had not, at the time we heard argument, concluded whether one or two plans existed, the fundamental structure of the Canadian and American Plans are sufficiently similar that it was possible to argue the issue without having first reached any conclusion on which of the two plans governed the officers and employees of the Canadian locals.

30. In essence, counsel for the applicants states that the Canadian Plan fits nicely within the broad wording of the defined term "employment benefit plan" (see subsection 150(6) of the Act, set out above), and therefore that the provisions of section 150 ought to apply to the circumstances. He observed that the Canadian Plan provides various benefits (pension, disability, and death benefits) to individuals and/or their dependents or beneficiaries because of that individual's employment (and, in the case of local union officials, because they are required to be members of the trade union). There is no dispute that the three Ontario locals contribute to the Canadian Plan on behalf of their officers and employees, in accordance with the terms of the Canadian Plan. Given the broad wording of the provision, and the principle enshrined by section 10 of the *Interpretation Act* (R.S.O. 1990, c. I.11) that all legislation ought to be considered to be remedial in nature, and given a large and liberal interpretation, counsel for the applicants submits that no other conclusion can be reached by the Board but that the Canadian Plan is subject to section 150 of the Act.

31. In response, counsel for the responding parties urges the Board to conclude that section 150 of the Act was never intended to cover employment benefit plans which are not jointly-trusted. That is, counsel argues that the rights created by section 150 of the Act were intended to apply to situations where representatives of both employers and trade unions are joint trustees of a benefit plan which applies to employees of employers participating in the plan. This is an entirely different situation. Here, the Canadian Plan is not a traditional, jointly-trusted plan but rather is a plan created by the International for employees and officers of its locals in Ontario. In support of this proposition, counsel reviewed with the Board (without objection from opposing counsel) minutes of the Standing Committee on Resources Development of the Ontario legislature dated November 15, 1993, during which the then Deputy Minister of Labour, James R. Thomas, discussed the proposed Bill 80 amendments, including the predecessor to section 150. Counsel also noted during argument that each of subsections 150(1) to (3) specifically contains the words "excluding the trustees who are appointed by employers", and submits that the inclusion of these words makes it evident what the legislature was intending to address by these provisions.

32. We have considered quite carefully the arguments of both counsel. We are of the view that the Canadian Plan is an “employee benefit plan” for the purposes of section 150 of the Act. As is noted by counsel for the applicants, the words used in the Act to define the concept of “employment benefit plan” are quite broad, and easily encompass the type of benefit plan identified in this proceeding. The Canadian Plan provides benefits to individuals and/or their dependents because of that individual’s employment with or membership in Locals, 1, 2 or 5.

33. The minutes of the Standing Committee of the legislature respecting the Bill 80 amendments are ambiguous and therefore unhelpful, even if we felt that it was appropriate to consider them, which we do not. In our view, the opinion of a Deputy Minister of Labour respecting the purpose of legislation is not probative of the intention of the legislature.

34. The specific exclusions contained in subsections 150(1) to (3) of employer-appointed trustees do not lead us to conclude that section 150 of the Act was intended to apply only to jointly-trusted benefit plans. The wording contained in section 150 of the Act was drafted in the context of “employment benefit plans” that do not have joint trusteeship, such as the plan before the Board, of which the legislature is presumed to have been knowledgeable. Section 150 clearly anticipates that jointly-trusted benefit plans will be subjected to its terms and makes specific provision for that eventuality. But there is no suggestion that the *only* employment benefit plans that may be caught by its terms will be of that nature. If that were the intention of the legislature, one would have thought that the definition of the term “employment benefit plan” would have been *itself* structured so as to exclude any type of plan other than those which are jointly-trusted. The definition of that term clearly does not do that. Instead, it captures a wide variety of benefit plans within its purview, consistent with the overall thrust of Bill 80, which is to ensure greater local union autonomy in the construction industry.

35. Accordingly, we are of the view that the Canadian Plan is an “employment benefit plan” as defined by subsection 150(6) of the Act, and therefore that it is governed by the terms of section 150 of the Act.

IV. Does Section 150 Otherwise Apply?

36. There does not appear to be much dispute regarding the applicability of subsections 150(2) and (3) of the Act to the circumstances before the Board. It was agreed by the parties that the Canadian Plan applied to 46 persons in Canada, 36 local union officials and 10 employees. The 36 local union officials are members of their respective locals. In our view, these facts establish that benefits under the Canadian Plan are provided “primarily to members of more than one local trade union or to their dependants or beneficiaries” for the purpose of subsection 150(2) of the Act.

37. It would also appear beyond dispute that subsection 150(3) of the Act applies to the circumstances. That is, benefits are, in fact, provided to members outside of Ontario or to their dependents. Of the 46 local union officials and employees governed by the terms of the Canadian Plan, 28 (21 local union officials and seven employees) are from Ontario. In accordance with the terms of subsection 150(3), the local trade unions are entitled together to appoint “that proportion of the trustees ... that corresponds to the proportion that the *members* in Ontario of the local trade unions bear to the total number of *members* participating in the plan” (emphasis added). In this case, the local trade unions are entitled to appoint the proportion of 21/36, or 58.33% of the trustees of the Canadian Plan.

38. We note here that we heard argument from the parties regarding the question of the identity of the employer or employers for the purposes of the Canadian Plan and section 150 of the Act. It was the position of the applicants that there were a “multitude” of employers under the Canadian Plan, including the OPC, and Locals 1, 2 and 5. It was the position of the applicants that the International was not an employer for the purposes of this proceeding. The International, on the other hand, asserted

that Locals 1, 2 and 5 were employers for the purposes of this proceeding, as was the International, which it characterized as the “ultimate employer”. Accordingly, all of the parties agreed, at the very least, that Locals 1, 2 and 5 were employers for the purposes of this proceeding.

39. Subsection 150(3) of the Act excludes from its terms “trustees appointed by employers”. It was this aspect of section 150 of the Act which caused the International to conclude that the Canadian Plan ought not to be subject to the Act, having regard to the fact that Locals 1, 2 and 5 are “employers” for the purposes of section 150. There is some merit to that position, as the application of the provision in some cases could be difficult to effect if the “local trade unions” are also “employers” under the plan and the Act. In this particular case, those difficulties are theoretical, because the five trustees currently seated are all appointed by the International, and we are of the view that the International is not an employer for the purposes of this proceeding or the Canadian Plan. The “employer” of the pertinent local union officials and employees are the locals themselves. It is the locals themselves that make contributions to the Canadian Plan, and not the International. While the International may be at or nearer the top of the pyramid from an affiliation perspective, that is insufficient to establish “employer” status (“ultimate” or otherwise) of the local union officers and others who benefit from the Canadian Plan for the purposes of this proceeding. Accordingly, there are currently no “trustees appointed by employers” and those words in subsection 150(3) have no effect on the success or failure of this application.

V. Remedy

40. During the course of the hearing, counsel addressed the issue of remedy in the event we were to find in favour of the applicants on the section 150 application, as we have now done. Counsel argued the applicability of section 149 of the Act to the circumstances, and the need to provide certain declarations, directions and orders requested by the applicants.

41. It is evident that the responding parties have violated section 150 of the Act by refusing to accept the right of the applicant local unions to appoint trustees to the Canadian Plan. There was no challenge made by the responding parties regarding the appointment process utilized by the three local unions to appoint Messrs. Buttazzoni, Wilson and Haggis as trustees of the Canadian Plan. Accordingly, it is not in dispute that the process utilized was in accordance with subsection 150(5) of the Act. However, the International refused to recognize the right of the local unions to seat trustees on the Canadian Plan, and this is clearly in contravention of section 150 of the Act. We so declare.

42. At this stage, however, we will not make any further remedial order beyond that made immediately above. We do so for a number of reasons. First, the remedial orders requested by the applicants were premised, presumably, on the belief that the Ontario local unions had a proportion of members in the Canadian Plan that exceeded 60 percent. There were five trustees of the Canadian Plan at the time of the application. Accordingly, the applicants assumed, no doubt, that success in this application would permit them to seat three of the five trustees, and they elected Messrs. Buttazzoni, Wilson and Haggis. It is evident that the local unions are entitled only to 58.33% of the trustees of the Canadian Plan. As a practical matter, this may result in the applicants seating the three individuals identified above as trustees. Or it may not. We think it best to remit this issue back to the parties for discussion. At this stage, we are unwilling to declare that all three of the trustees are entitled to sit as trustees, and we are unwilling to arbitrarily choose two of the three ourselves.

43. Just as importantly, we are of the view that some of the relief requested is premature. For example, the applicants have requested of the Board that it direct the remaining trustees of the Canadian Plan to provide the three named trustees “with all information and documentation that trustees are entitled to under the Pension Plan and the laws of Ontario”. A direction of that nature may be somewhat unnecessary. It appears to us that the responding parties had a *bona fide* argument respecting the

applicability of section 150 to the circumstances, and the decision made by the International to not accede to the request of the applicants to seat three trustees on the Canadian Plan was not patently unsupportable. Given this decision, it can be anticipated that the trustees named by the local unions will in the future obtain any and all information and documentation to which they are entitled. However, if problems do arise, the applicants may have various remedial options available to them, in various forums.

44. Finally, and in a related vein, we are of the view that it is not appropriate to consider the applicability of section 149 to the circumstances of this case. The Board has a discretion to decline to consider any application brought under section 96 of the Act, such as one launched pursuant to section 149 of the Act. This case is clearly one of first impression, and the position taken by the responding parties, as indicated above, had some merit. In these circumstances, even if we were to conclude that the International had, without just cause, "otherwise interfered" with the local trade unions, we would not issue any remedy other than a declaration reflecting that interference. In the context of the current litigation pending at the Board between the parties, we do not consider it conducive to good labour relations to consider or rule on the section 149 application.

45. We will remain seized of this proceeding.

CONCURRING OPINION OF BOARD MEMBER G. McMENEMY; July 15, 1998

1. While I agree with the decision in this case, I would like to make a comment on the issue of good labour relations as noted in paragraph 44.

2. This case is the latest in a long and expensive series of cases that deal with the issue of the power of the parent international union over their Ontario affiliates.

3. It has to be obvious to all the parties and especially the International Union that the Ontario *Labour Relations Act* ("Act") mandates different treatment of the Ontario locals and their members than, for example, local unions in Texas and their members.

4. I would suggest very strongly that there has to be change in the relationship between the parties to this proceeding. I think it is clear that the Act mandates a change in attitude, and certainly this decision, coupled with the other decisions between these parties reflects a change of attitude.

5. Since this case began and the final decision has been released there have been major changes again to the Act.

6. If the history of the legal decisions between these parties do not suggest a change of attitude is needed, then the changes to the Act should.

7. Money spent on this continued battle between the International and the Ontario Provincial Conference and its affiliated locals could be better and more usefully spent elsewhere.

1324-98-ES; 1682-98-ES Paul R. Ostrander, Applicant v. Ministry of Labour and Donald E. Beckett, Responding Parties; Donald E. Beckett, Applicant v. Ministry of Labour and Paul R. Ostrander, Responding Parties

Employment Standards Act - Timeliness - Directors applying for review of order of employment standards officer and securing irrevocable letters of credit satisfactory to Director

of Employment Standards 50 days after date of order - Board exercising its discretion to extend time for applying for review where extension is quite short and there appears to be legitimate dispute regarding quantum of order to pay

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD; August 18, 1998

1. The applicants have filed with the Board individual applications for review of an Order to Pay, pursuant to section 68 of the *Employment Standards Act*, R.S.O. 1990, c. E.14, as amended (hereinafter "the Act"). These are both director's appeals.

2. Section 68(1) of the Act provides, amongst other things, that any person who considers himself aggrieved by an Order made under section 58.22 of the Act may apply to the Board for review of that Order. Section 68(3)(a) of the Act provides that the application for review must be made within 45 days after the date of the Order. In this case, the order was dated June 25, 1998. Section 68(7) of the Act further provides that an application for review is not properly made, and that the Board may not proceed with the review, unless the applicant pays to the Director of Employment Standards in trust the amount reflected by the order to pay within the time for applying for the review - i.e. the 45 day period, or any longer period determined by the Board in accordance with section 68(4) of the Act. Alternatively, an irrevocable letter of credit acceptable to the Director may be secured by the applicant within that time period.

3. The Board has been advised by the Director of Employment Standards that the applicants in these proceedings secured irrevocable letters of credit satisfactory to the Director on Friday, August 14, 1998. Accordingly, it has taken the applicants 50 days after the date of the Order to make their application for review. I am required, therefore, to determine whether it is appropriate to extend the time for applying for a review in accordance with section 68(4) of the Act.

4. In the circumstances, there is no reason not to extend the time for applying for review. The Board will typically not consider extending the time for filing for review until the applicant has paid the money ordered to be paid to the Director of Employment Standards in trust, or has secured an acceptable letter of credit. This has been done here. The extension requested is quite short - 5 days - and it would appear possible that the resolution of the question of any monies due to employees under the Act may be resolved without the need for hearings. It would also appear that there is a legitimate dispute regarding the quantum of the Order to Pay.

5. Accordingly, I exercise my authority under section 68(4) of the Act to extend the time for filing these applications to August 14, 1998. The applications have been properly made and can be proceeded with in accordance with the Act.

6. In the circumstances, these two proceedings should be heard together by the same Vice-Chair, in order to minimize the need to call duplicative evidence. In accordance with section 68(9)5 of the Act, Paul R. Ostrander is made a party to Mr. Beckett's appeal, and Donald E. Beckett is made a party to Mr. Ostrander's appeal. I will leave it to the Vice-Chair hearing the matters on the merits to determine the order of proceeding with these Board Files.

0987-97-U; 0988-97-JD; 2866-97-G Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 10, Applicant v. **Phoenix Restoration**, A Division of Phoenix Gunitite Services Limited and Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local 598, Responding Parties; International Union of Bricklayers and Allied Craftworkers, Local 10, Applicant v. Phoenix Restoration, A Division of Phoenix Gunitite Services Limited and Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local 598, Responding Parties; Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 10, Applicant v. Phoenix Restoration, A Division of Phoenix Gunitite Services Limited, Responding Party v. Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local 598, Intervenor

Construction Industry - Jurisdictional Dispute - Bricklayers' union and Cement Masons' union disputing assignment of certain stone masonry restoration work - Board satisfied that work ought to have been assigned to Bricklayers' union

BEFORE: *Robert Herman*, Alternate Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *L. A. Richmond*, *A. Leduc* and *J. Coelho* for the applicant; *Walter Thornton*, *Vince Brannigan* and *Michael Brannigan* for Phoenix Restoration, A Division of Phoenix Gunitite Services Limited; *James Hayes*, *David Matheson* and *Livio Balanzin* for the Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local 598.

DECISION OF THE BOARD; July 14, 1998

1. These are three applications: an unfair labour practice, a related jurisdictional dispute, and a related application pursuant to section 133 of the *Labour Relations Act, 1995*. All three matters were listed for hearing together.

2. At the hearing, the Board orally ruled that it would defer consideration of the unfair labour practice and construction industry grievance, until it was necessary. Both of those matters involved a challenge to the validity of a collective agreement between the responding employer, Phoenix Restoration, A Division of Phoenix Gunitite Services Limited ("Phoenix Restoration"), and the Operative Plasterers', Local 598 ("Local 598"). As there was some reasonable prospect that this question would not have to be determined in order to decide the work assignment dispute, the Board concluded that it would first proceed with the consultation in the jurisdictional dispute. If the Board was able to resolve the jurisdictional dispute without determining the validity of the collective agreement between Local 598 and Phoenix Restoration, then the Board would do so.

3. At the conclusion of the consultation, on March 30, 1998, the Board provided an oral decision to the parties, as follows:

1. Before providing our decision, we have some preliminary comments to make.

2. We do not decide or comment upon the validity of the collective agreement between Phoenix Restoration and the Operative Plasterers, and we have assumed it to be valid, for purposes of our decision in the jurisdictional dispute.
3. It must be kept in mind that this is a jurisdictional dispute consultation. The Board recognizes that there have been facts asserted by one party that the other parties have disagreed with, and some facts asserted for the first time in oral submissions, which were not contained in the materials filed by any of the parties. Nevertheless, given the consultation mode of this proceeding, unless the Board were to conclude that it was essential to determine these disputed facts in order to decide the jurisdictional assignment, the Board would not entertain evidence with respect to these matters. As a general proposition, a consultation does not get into the resolution of disputed facts unless essential to do so in order to answer the jurisdictional assignment question. Here, a number of factual matters were disputed, but in the result, the Board has not found it necessary to resolve those facts, nor does it base its decision upon those disputed matters.
4. As well, the Board recognizes that a consultation is a more fluid, less rigid process than a traditional Board hearing, and that the Board tends to be more directive and on occasion more interventionist. In a consultation, extensive written materials are required and pleaded in advance, and are read and considered by the Board before the consultation begins. The process of the consultation enables the Board to have a good understanding of the positions of the parties, and the material facts upon which they rely, prior to the commencement of the consultation, with the hope that this method and process will reduce hearing time, while still ensuring that all parties' cases are considered fairly, with fair opportunity to set out their positions.
5. Turning to the merits of the jurisdictional dispute, we accept that there are "speciality contractors".
6. We conclude that the Bricklayers' collective agreement covers the work in dispute, but so too does the collective agreement with the Operative Plasterers.
7. We are also satisfied that there are members of both unions who are capable of doing the work in dispute, although not all members of either union are so qualified.
8. With respect to area practice, in this Board Area (Board Area 29) the area practice appears mixed. Whatever or however one characterizes or labels the work in dispute, the practice of employers in this area is mixed in terms of which trades or unions have been utilized in the past.
9. With respect to employer practice, Phoenix Restoration performed the work in dispute in this project in a context where it had a pre-existing collective agreement, covering the work, with the Bricklayers. Phoenix then obtained a contract for work in Board Area 29. Prior to that point in time, it had no collective agreement with the Operative Plasterers. Phoenix then voluntarily recognized Local 598, with respect to this work and for this project.
10. In these circumstances, the Board is satisfied that the work ought to have been assigned to Bricklayers Local 10. There is a competition of sorts between a union with pre-existing bargaining rights, covering the work in dispute, and a union voluntarily recognized just prior to the work in dispute being performed. In our view, the claim of the recently recognized union to perform this work is weak in such circumstances.
11. Accordingly, the assignment should have been made to the Bricklayers.
12. The applications pursuant to section 96 and 133 of the Act are hereby adjourned *sine die*, for a period of one year, to be relisted upon the request by any of the parties. If no such request is received by the Board within one year from March 30, 1998, these matters will be automatically terminated.
13. This panel is not seized.

1570-98-HS The Regional Municipality of Hamilton-Wentworth, Applicant v. Ministry of Labour, Responding Party

Health and Safety - Board declining request made by municipality under section 61(7) of *Occupational Health and Safety Act* to suspend order of inspector pending hearing of merits of its appeal - Board's concern regarding scope of inspector's order outweighed by severe health and safety consequences which could result to public and workers from suspension of order and failure of applicant to identify prejudice it would face if order maintained

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD; August 20, 1998

1. This proceeding consists of a request by the applicant that an order made by an Occupational Health and Safety Inspector in Field Visit 795312 (dated July 16, 1998) be suspended, pending the hearing of the merits of the appeal, in accordance with section 61(7) of the *Occupational Health and Safety Act*. By way of decision dated August 4, 1998, the parties were directed to file with the Board their submissions regarding the appropriate disposition of the suspension request. As noted by the Board in the previous decision, a hearing is usually not held to dispose of suspension requests.

2. The applicant did not take the opportunity to file with the Board any submissions beyond those dated July 28, 1998. The responding party also did not file any submissions with the Board prior to close of business August 18, 1998, which was the time within which any submissions were to be provided. Accordingly, I have reached my decision based upon the materials initially provided by the applicant.

3. The order in question is directed to the applicant, and affects three different waste transfer stations operated by it. The text of the order is as follows:

Pursuant to the Ind. Reg. 851/90 Sec. 4(1)(e) the owner shall ensure that NO children under the age of 14 are allowed in or about the workplace. This order to be complied by 5 p.m. 16 July 98. On visits to the Transfer Stations located at 37 Kilbride St. Hamilton; Olympia Dr., Dundas; and Kenora Ave., Hamilton public with small children were observed - the children wandered unsupervised in the immediate area of operating heavy equipment including front end loader(s) and garbage haulers. This order applies to Transfer Stations located at 37 Kilbride St. Hamilton; Olympic Dr. Dundas; Kenora Ave North.

4. The regulatory reference contained in the order is to the Industrial Establishments Regulation 851/90, issued under the authority of the *Occupational Health and Safety Act*. Section 4(1) of that regulation provides as follows:

Subject to subsection (2), the minimum age of,

- (a) a worker; or
- (b) a person who is permitted to be in or about an industrial establishment,

shall be,

- (c) sixteen years of age in a logging operation;
- (d) fifteen years of age in a factory other than a logging operation; and
- (e) fourteen years of age in a workplace other than a factory.

Section 4(2) of the Act provides for certain exceptions to the above limitations:

Clause 1(b) does not apply to a person who,

- (a) while in the industrial establishment, is accompanied by a person who has attained the age of majority;
- (b) is being guided on a tour of the industrial establishment;
- (c) is in an area of the industrial establishment used for sales purposes; or
- (d) is in an area of the industrial establishment to which the public generally has access.

5. The applicant bases its suspension request upon sections 4(2)(a) and (d) of the Regulation. With respect to its submissions respecting section 4(2)(a) of the Act, the applicant asserts that persons who come to the transfer stations must do so in a vehicle which suggests that the driver of the vehicle (and therefore the person accompanying any children) is at least 16 years of age. It is also submitted that people attending at the transfer stations tend to be home owners, and therefore it can be assumed that they have reached the age of majority. With respect to the other basis for appeal, the applicant asserts that the transfer stations were opened in 1978, and that since that time the public has always had access to the stations for the purpose of disposing of solid wastes.

6. Three factors have generally been considered by the Board when determining whether a suspension of an order is appropriate in the circumstances:

- (a) whether the suspension of the order (or, alternatively, the failure to suspend the order) would endanger worker safety;
- (b) the prejudice to the parties if the order is or is not suspended; and
- (c) whether there is a strong *prima facie* case for a successful appeal of the order.

It is fair to say that the onus lies upon the party desiring the suspension order to establish that such an order ought to issue. Furthermore, the decision of Adjudicator Herman in *General Motors of Canada Limited* (File No. 3666-96-HS, decision dated June 2, 1997) stands for the proposition that a certain degree of deference must be afforded to decisions made by inspectors for the purpose of considering the suspension of those orders pending their appeal. In the absence of some persuasive reason to interfere with that order pending the hearing of the appeal on the merits, the original order ought not to be suspended.

7. In light of the material filed with the Board, I have determined to not suspend the order made by the Inspector, pending the disposition of the merits of the appeal. I reach this conclusion with some reluctance, because it appears to me that there is a strong argument that the order of the Inspector in effect ignores the exception described by section 4(2)(a) of the regulation. That is, rather than ordering that no persons under the age of 14 be permitted in the transfer stations unless accompanied by a person who has attained the age of majority, the Inspector has merely prohibited the presence of persons under the age of 14. It appears to me that there is a strong *prima facie* argument that the Inspector has issued an order beyond the parameters provided by the regulation, at least as it currently reads. A similar argument can be made with respect to section 4(2)(d) of the regulation, though it is not quite as persuasive, in my view.

8. That being said, certain other factors militate against the suspension of the order. First, although the safety of workers is not directly in question, the safety of the public is; in particular, children who attend at the transfer stations with or without adequate supervision. There could potentially be an effect on the health and safety of workers should any one of these children cause or contribute to an industrial accident.

9. Furthermore, there is nothing relied upon by the applicant to suggest that there is any prejudice in maintaining the order in effect pending the litigation of its validity. The decision of August 4, 1998 invited the applicant to provide the Board with any evidence it had suggesting that some prejudice would result to it should the suspension request not be successful. At no time has the applicant identified any prejudice it would face should it be required to ensure that young children be excluded from the transfer stations in question, as directed by the Inspector.

10. Keeping in mind the deference to which the Board gives orders issued by Inspectors who attend at worksites around the province, the concern I have regarding the scope of the order is outweighed by the severe health and safety consequences which could result to the public and the workers at the transfer stations from a suspension of the order, and the failure of the applicant to identify any prejudice it would face should the order be maintained.

11. In the circumstances, this application is dismissed. Board File 1568-98-ES is to be forwarded to the Registrar for scheduling.

1150-95-R; 1363-95-U; 1364-95-R Labourers' International Union of North America, Local 183, Applicant v. 517739 Ontario Ltd., c.o.b. as **Rolan Plumbing**, Responding Party v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Intervenor; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant v. 517739 Ontario Ltd., c.o.b. as Rolan Plumbing, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant v. 517739 Ontario Ltd., c.o.b. as Rolan Plumbing, Responding Party v. Labourers' International Union of North America, Local 183, Intervenor.

Certification - Construction Industry - Employee - Board concluding that its long-standing approach of applying the *Trades Qualification and Apprenticeship Act* (TQAA) to applications for certification in the construction industry relating to compulsory certified trades applies to applications brought under section 146(3) of the Act - Board also holding that it is incorrect to conclude that someone who does not satisfy the obligations contained in the TQAA may accordingly be characterized as a "construction labourer" - Where an individual who worked for the employer on the certification application date spent a majority of time performing the work of a plumber but was working beyond the scope of the TQAA, that individual would be off the list of employees for purposes of the application

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Mark Wright* for Labourers' International Union of North America, Local 183; *Mark Stone* for 517739 Ontario Ltd., c.o.b. as Rolan Plumbing; *David McKee* for United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46.

DECISION OF THE BOARD; July 14, 1998

1. These proceedings are, respectively, an application for certification brought by Labourers' International Union of North America, Local 183 (hereinafter "Local 183") as against 517739 Ontario Ltd., c.o.b. as Rolan Plumbing (hereinafter "Rolan"), an unfair labour practice complaint brought by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (hereinafter "Local 46") against Rolan, and an application for certification brought by Local 46 as against Rolan. In accordance with a decision of a differently constituted panel of the Board dated July 14, 1995, consideration of the application for certification brought by Local 46 has been postponed pending the Board's final decision in Board File 1150-95-R.

2. These applications were filed with the Board prior to the effective date of the *Labour Relations Act, 1995*, and therefore are to be determined by reference to the *Labour Relations Act*, R.S.O. 1990, c. L.2, as amended (hereinafter "the Act").

3. These proceedings have a long history, which I do not propose to outline in any great length in this decision. Condensed to its essential elements, these proceedings first came on for hearing before this panel of the Board in late 1995. At that time, certain issues were referred to a Labour Relations Officer for examinations and an Officer's Report. Three days of examinations followed. At the request of Local 183 and Rolan, these proceedings were re-listed for hearing in February, 1996. At that time it was agreed to argue certain legal issues at a subsequent hearing date in order to potentially narrow the matters to be dealt with before the Labour Relations Officer. Counsel then acting for Local 46 (Local 46 has since retained its current counsel) provided the Board with written submissions respecting all of the issues, and the Board directed that the Registrar contact the parties and set two hearing dates for argument. Dates have been set and adjourned and/or cancelled since then, until May 21, 1998, when these matters came back on for hearing of the legal argument.

4. This decision deals with the one legal issue argued on May 21, 1998, namely the applicability of the *Trades Qualification and Apprenticeship Act*, R.S.O. 1990, c. T.17, as amended (hereinafter "the TQAA") to the circumstances of Local 183's certification application.

5. The question of the applicability of the TQAA arises in the following circumstances. Local 183 has applied for a certificate entitling it to represent the following bargaining unit of employees of Rolan:

all plumbers and plumbers' apprentices and construction labourers in the employ of the responding party in all sectors of the construction industry, save and except the industrial, commercial and institutional sector of the construction industry in Ontario Labour Relations Board Areas 8 and 9, save and except non-working foremen and persons above the rank of non-working foreman.

Rolan agrees that this bargaining unit is a unit appropriate for collective bargaining. Local 46 disagrees with that proposition.

6. Filed with the response of Rolan was a Schedule containing the names of all persons that it asserts were employed in the proposed bargaining unit on June 14, 1995, the certification application date. The list is composed of 25 individuals. Each of the individuals has been identified on the list as either a "plumber" or an "apprentice". Local 183 has not challenged the composition of that list, or the classification attributed to each of the persons on the list. Local 46 has made numerous challenges to the list.

7. In a previous decision of the Board dated November 8, 1995, I made reference to a certain difficulty raised in the circumstances of this case. The long-standing practice of the Board in applications for certification in the construction industry which exclude the ICI sector is to require the applicant to represent a bargaining unit consisting of all unrepresented trades employed by the responding party on the certification application date (see, for example, *Duron Ontario Limited*, [1976] OLRB Rep. Nov.

734, and *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195). If the Schedule affixed to the response is accurate, the appropriate bargaining unit cannot include “construction labourers”, as there were none employed by Rolan on the certification application date. However, it is Local 183 and Rolan which argue that the bargaining unit description ought to include “construction labourers”. Just as inconsistently, Local 46 (at that time at least) argued that Local 183 ought not to be entitled to represent “construction labourers”, but asserted that there were persons performing work of a construction labourer in the employ of Rolan on the certification application date. Accordingly, I did not make a determination regarding the appropriateness of the bargaining unit requested, and referred the matters to the Labour Relations Officer for examinations in accordance with specific challenges then raised by the parties.

8. As noted above, the parties have agreed to argue the applicability of the *TQAA* to the circumstances in order to potentially minimize the issues to be litigated. The argument of the parties reflected their fundamentally different characterizations of persons who may be performing the work of a plumber or a plumbers’ apprentice, in violation of the *TQAA*. Interestingly, with one rather significant exception, the parties did not dispute the state of the Board’s jurisprudence.

9. From the outset of these proceedings, Local 183 and Rolan have taken the position that any person at work on the certification application date who performed work normally performed by plumbers or plumbers’ apprentices, but who was not a certified plumber or a properly registered apprentice was, by definition, a “construction labourer”, and therefore that the bargaining unit it has requested (or agreed to, in the case of Rolan) is appropriate even if Local 46 is right in its assertion that certain of the individuals identified as “plumbers” or “apprentices” on the Schedule to the response were not certified plumbers or registered apprentices on the certification application date. Local 46 asserts that this is a fundamentally incorrect position.

10. Local 46 posits that since the cases of *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41, and *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220, the Board has considered only what tasks an individual was performing on the certification application date when determining whether the person was performing bargaining unit work for the majority of his or her time on that day. If a person was performing the work of a plumber or a plumbers’ apprentice on June 14, 1995, he or she would fall into a bargaining unit of “plumbers and plumbers’ apprentices”. If the *TQAA*, when applied, excludes any such person from lawfully being at work on that day, the effect is to exclude that person from “employee” status under the Act. It is submitted that it is wrong to utilize the concept of a “construction labourer” as a “basket classification” for everything beyond the lawful work of a plumber or plumbers’ apprentice. As no one asserts that any employee did the work of a “construction labourer” on June 14, 1995, the appropriate unit is one consisting of “plumbers and plumbers’ apprentices”.

11. Local 183 and Rolan disagree with this analysis. In their view the bargaining unit requested by Local 183 is appropriate for collective bargaining. All that Local 183 is trying to encompass in its bargaining unit description is the unrepresented trades at work for Rolan on the certification application date. Counsel noted that it has now been conceded by Rolan that at least 5 individuals on the Schedule were not properly described as a “plumber” or a “plumbers’ apprentice” in accordance with the *TQAA*, and therefore submit that they are “construction labourers”. That is, counsel for Local 183 and Rolan submit that the effect of the *TQAA*, if applied to those 5 persons, is to make those persons “construction labourers” for the purposes of the application. If the Board were to conclude otherwise, those 5 persons would be excluded from the bargaining unit inappropriately, and the Board would, in effect, be enforcing the *TQAA*, which the Board has specifically stated it does not do.

12. As noted above, there was no dispute regarding the state of the law, with one significant exception. The parties agreed that the Board’s jurisprudence, commencing with the decision of *Irvcon*

Roofing & Sheet Metal (Pembroke) Ltd., [1981] OLRB Rep. Nov. 1594, and most recently elaborated upon in the decisions of *Marsil Mechanical Inc.*, [1997] OLRB Rep. July 636, *Briar Mechanical Limited*, [1998] OLRB Rep. Jan. 6, and *Marken Electric Ltd.*, [1998] OLRB Rep. Mar./Apr. 257, establishes that for compulsory, certified trades (which includes the trade of plumber), the Board will have regard to the terms of the *TQAA* and its related regulations when determining the “employee” status of an individual for the purposes of an application for certification filed under the Act.

13. Since the *Irvcon Roofing* decision, it has been established that an employee who holds an appropriate certificate of qualification in a compulsory certified trade, and an employee who has entered into a contract of apprenticeship in a compulsory certified trade can lawfully work in that trade. In *Marsil Mechanical Inc.*, this principle was refined (as previously suggested by the Board in *Heritage Mechanical*, [1995] OLRB Rep. Mar. 272) to reflect the wording of section 9(1) of the *TQAA*, which permits a person to work at a compulsory, certified trade for which an apprenticeship training program is established without a certificate of qualification or a certificate of apprenticeship for up to three months. The critical passage of *Marsil Mechanical Inc.* consists of paragraphs 17 and 18 of that decision, which read as follows:

17. The Board's functions do not include administering or enforcing the *Apprenticeship Act* as such. In applying the *Apprenticeship Act* in applications for certification or other proceedings (jurisdictional disputes, for example), the Board is concerned only with the *status* of employees under the *Apprenticeship Act* for purposes of the *Labour Relations Act, 1995*. It is patently obvious that under the *Apprenticeship Act* there are persons other than certified journeymen or registered apprentices who can lawfully work or be employed in even a compulsory certified trade.

18. It is true that under the *Apprenticeship Act* “apprentice” is in effect defined as being a person who has entered into a contract of apprenticeship, and that section 10(2) provides that no one other than an apprentice or person exempted under section 10(4) can work or be employed in a compulsory certified trade unless s/he is a certified journeyman. However, section 9(1) contemplates that a person can commence work in a trade without being either an “apprentice” as defined in the *Apprenticeship Act* or a certified journeyman, provided that such a person must “forthwith” apply to become an apprentice and within three months of commencing work in a trade file a contract of apprenticeship with the Director. Section 9(2) goes on to provide that a person who does not comply with section 9(1) within three months must *then* stop working in the trade ... It is apparent that the definitions and the provisions of sections 9 and 10 of the *Apprenticeship Act* must be read together, and that section 9 in effect provides a three month grace period for persons to become apprentices in the trade. Similarly, the requirement that a person “forthwith” apply for apprenticeship in a trade must be read in context, and requires only that a person do the things required to become an apprentice in the trade within three months of starting work in it. If s/he does so that is “forthwith” enough. Read as a whole, the *Apprenticeship Act* contemplates that a person who is neither an apprentice nor a journeyman in a compulsory certified trade can lawfully work or be employed in that trade for up to three months, or even for such longer period as the Director may authorize in writing. Accordingly, for the Board's purposes in an application for certification, a person who is neither an apprentice nor a journeyman in a compulsory certified trade but who has been working or employed in that trade for not more than three months has the status of an employee who is properly included in a bargaining unit which includes employees in the trade.

As noted above, none of the parties to these proceedings disputed that the current state of the Board's jurisprudence is reflected by this passage from *Marsil Mechanical Inc.*.

14. I observed earlier that there was one substantive difference evident in the approaches taken by Local 46, on the one hand, and Local 183 and Rolan, on the other. Local 46 asserts that the legal principles reflected in *Marsil Mechanical Inc.* and its predecessors apply in all applications for certification in the construction industry involving compulsory certified trades. Local 183 and Rolan disagree. They submit that the case law enshrining the above legal principles is limited to applications for certification which affect the ICI sector of the construction industry.

15. During the course of argument, the following cases were referred to by the parties: *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, cited above; *C T Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563; *B.C. Meck*, [1988] OLRB Rep. June 546; *P & M Electric*, [1989] OLRB Rep. June 638; *O.J. Pipelines Incorporated*, [1989] OLRB Rep. Sept. 976; *Gorf Contracting Limited*, [1991] OLRB Rep. Apr. 483; *Siteco Electric Ltd.*, [1992] OLRB Rep. Mar. 383; *Heritage Mechanical*, cited above; *N C Sheet Metal*, [1995] OLRB Rep. Mar. 333; *Marsil Mechanical Inc.*, cited above; and *Briar Mechanical Limited*, cited above. To the extent that the decision identifies the nature of the certification application, each of the above cases - with one exception - involves an application for certification in the construction industry in which bargaining rights in the ICI sector of the industry were sought.

16. The one exception is *P & M Electric*. In that case, the applicant desired a certificate to represent a bargaining unit of certified journeymen electricians and registered apprentices in all sectors of the construction industry, excluding the ICI sector of the construction industry, in Board Area 8. The application was brought pursuant to the predecessor of section 146(3) of the Act. After noting that the trade of electrician is a compulsory certified trade under the predecessor to the *TQAA*, the Board applied the principles of the *TQAA* (as the Board's jurisprudence then stood) to exclude four individuals who were neither journeymen nor apprentice electricians within the meaning of the *TQAA*. Counsel for Local 183 asserted that the unit applied for in *P & M Electric* was a craft unit, pursuant to section 6(3) of the Act, and accordingly the same principles that would apply to an ICI certification application applied to it. Here, Local 183's application is pursuant to section 6(1) of the Act, is not a "craft" unit, nor an ICI unit, and therefore the principles reflected by the 17 years of Board jurisprudence since *Irvcon Roofing* do not apply.

17. I have considered quite carefully the argument of the parties on this point. For the reasons which follow, I am of the view that the position taken by Local 46 is correct in law, and therefore that the Board's longstanding approach to employee status issues with regard to certification applications respecting compulsory certified trades applies to Local 183's certification application.

18. At the outset, it is important to outline the approach taken by the Board to applications for certification in the construction industry. As was pointed out by the Board at para. 6 of *O.J. Pipelines Incorporated*, cited above, section 6(1) of the Act provides the Board with a discretion in determining "the unit of employees that is appropriate for collective bargaining". However, in construction industry applications for certification, that discretion is limited by sections 6(3), 121, 141 and 146 of the Act. Every application for certification in the construction industry must be made pursuant to section 146 of the Act (see, for example, *Clarence H. Graham Limited*, cited above). A trade union which is an affiliated bargaining agent of a designated employee bargaining agency (as Local 183 is) may, at its option, apply for certification under either section 146(1) or 146(3) of the Act. In fact, the instant application was brought under section 146(3) of the Act, which reads as follows:

146(3) Despite subsection 121(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

19. As in every application for certification, when a trade union applies for certification pursuant to section 146(3) of the Act the Board is required to determine the unit of employees that is appropriate for collective bargaining, as directed by section 6(1). As noted above, the Board's long-standing practice, where there are employees of more than one craft or trade at work on the certification application date, has been to find as a unit appropriate for collective bargaining all unrepresented employees as designated by their craft or classification at work for the employer on the certification

application date. In this proceeding, the bargaining unit will be described, at its broadest, by reference to plumbers and plumbers' apprentices and/or construction labourers, as the parties have agreed that there were no employees at work on the certification application date performing work other than work of those trades. Of course, Local 46 denies that any "construction labourers" were at work for the employer on June 14, 1995.

20. The question before the Board which must be addressed initially is whether the Board will apply the principle reflected by *Marsil Mechanical Inc.*, cited above, to an application for certification brought pursuant to section 146(3) of the Act. As noted above, I am of the view that it is appropriate to do so.

21. I reach this conclusion for the following reasons. First, it is not apparent to me that the rationale historically adopted by the Board for considering the limitations created by the *TQAA* does not apply to certification applications in the construction industry excluding the ICI sector, brought under section 146(3) of the Act. As noted by the Board in *P & M Electric (1982) Ltd.*, cited above, the purpose of the *TQAA* is to regulate the training and qualification of tradespersons, and, in the case of those performing work in compulsory certified trades (such as plumbers), to regulate the persons who can lawfully work in those trades. This purpose is equally legitimate whether the tradesperson performs plumbing work in the ICI sector, the residential sector, or any other sector of the construction industry. The legislature has determined that a certain level of training and skill is expected of persons performing the work of a compulsory trade. That level of training and skill is expected of plumbers involved in the construction of office buildings, hospitals, or homes. Accordingly, the *TQAA* does not by its terms distinguish amongst the various sectors of the construction industry in its application.

22. Although the Board is not responsible for enforcing the *TQAA*, the Board has noted on numerous occasions that it is obligated to make decisions in a manner which is not inconsistent with that legislation (see, once again, the decision of *P & M Electric (1982) Ltd.*, cited above). As the *TQAA* applies equally to each of the sectors of the construction industry, it would be inconsistent with the broad purpose of the *TQAA* for the Board to apply one principle to the determination of employee status for the purpose of certification applications which include the ICI sector of the construction industry, and another principle to the determination of employee status in certification applications which exclude that same sector. In a somewhat odd result, two individuals working for the same employer, working in the identical non-ICI sector of the construction industry, and with identical status for the purposes of the *TQAA*, could be treated differently for certification purposes dependent upon the section of the Act under which the trade union applies for certification. There is no rational basis for such a distinction.

23. For these reasons, then, I am of the opinion that the Board's long-standing principle, reflected most recently by the decisions of *Marsil Mechanical Inc.*, *Briar Mechanical Limited*, and *Marken Electric Ltd.*, all cited above, applies to this proceeding.

24. Having resolved that question, the related question of the proper characterization of those individuals who do not satisfy the criteria established by the *TQAA* must also be resolved. As noted above, Local 183 asserts that any person who performed plumbing work on the certification application date in contravention of the *TQAA* must properly be described as a "construction labourer" for the purpose of this proceeding. Local 46, on the other hand, asserts that such an individual is not properly characterized as a "construction labourer" and may not remain on the list of employees. Having considered the argument of the parties, I am of the view that the position taken by Local 46 is correct.

25. My analysis begins by reaffirming the proposition that for the purpose of determining whether a person is properly within a construction industry bargaining unit, the Board, since the decisions of *E & E Seegmiller Limited* and *Gilvesy Enterprises Inc.*, both cited above, has considered as relevant whether the person was employed by the responding party and at work on the certification

application date, and, if so, the type of work performed by that person for the majority of his or her time worked on the date of application. Accordingly, for the purposes of this application, the Board's inquiry will undoubtedly focus on the nature of the work performed by the individuals in question on June 14, 1995, the certification application date.

26. The concept of a "construction labourer" is not a "default" option for use in certification applications under section 146(3) of the Act. That is, I do not think that one can properly characterize an individual who, on the certification application date, performed the usual work of a certified plumber or a registered plumbers' apprentice contrary to the provisions of the *TQAA*, as a "construction labourer". If the person was at work for the responding party employer on June 14, 1995, and the majority of his time was spent performing the work of a plumber or a plumbers' apprentice on that date, lawfully or otherwise, then he cannot be considered to be a "construction labourer" for the purposes of the application.

27. That conclusion begs, immediately, the question of just what the proper characterization of such a person is for the purposes of this application for certification. Any individual who meets that criteria (i.e. a person who worked for the responding party on the certification application date, spent a majority of time performing the work of a plumber or plumbers' apprentice, and was working beyond the scope of the *TQAA*, as set out in *Marsil Mechanical Inc.*, cited above) is, by definition, off the list of employees for the purpose of the application. For the purposes of this proceeding, such individuals do not "count" at all.

28. The effect of reaching this conclusion is to preclude such individuals from becoming organized, as long as they continue to perform the work of plumbers and plumbers' apprentices, in contravention of the *TQAA*. Is this a reason to not conclude as I have above? In my view, the answer to that question must be in the negative. In many of the decisions relied upon by the parties during the course of argument, the Board concluded that one or more individuals were not "employees" for the purposes of the certification application in question, because they had not satisfied the obligations reflected by the *TQAA*. Effectively, those persons were precluded from organization for as long as they continued to perform work of the particular certified trade for the employer in contravention of the *TQAA*. This effect has always resulted from the Board's approach to determining employee status issues by reference to the *TQAA*, and the effect ought to be no different in applications pursuant to section 146(3) of the Act.

29. Accordingly, I am of the view (a) that the Board's long-standing principle of applying the *TQAA* to applications for certification in the construction industry relating to compulsory certified trades applies to applications brought under section 146(3) of the Act; and (b) that it is incorrect to conclude that someone who does not satisfy the obligations contained in the *TQAA* may be characterized as a "construction labourer" for the purposes of this proceeding.

30. Having reached those conclusions, and given the parties' agreement regarding the lack of other trades at work for the employer on the certification application date, it is evident that the unit appropriate for bargaining in the circumstances of this proceeding is the following:

all plumbers and plumbers' apprentices in the employ of the responding party in all sectors of the construction industry, save and except the industrial, commercial and institutional sector of the construction industry in Ontario Labour Relations Board Areas 8 and 9, save and except non-working foremen and persons above the rank of non-working foreman.

31. As noted above, these proceedings have been prolonged as a result of the various issues in dispute as amongst the parties. Keeping that in mind, and recalling as well that the Board has relatively recently developed a process of dealing with status disputes in construction industry applications for

certification which will govern any future litigation of the proceedings (see Information Bulletin #3), I have considered the possibility of requiring the parties to provide detailed submissions regarding their respective positions on each of the persons currently on the list of employees filed by Rolan, for the purposes of setting the parameters of any future litigation.

32. However, in the circumstances, I have concluded that it would make more sense, at this stage at least, for a Labour Relations Officer to be appointed in order to identify and resolve (or, at the very least, to narrow these issues, with the assistance of the parties and this decision. Accordingly, I refer these proceedings to the Manager of Field Services, who is to assign a Labour Relations Officer to meet with the parties in order to resolve or narrow the remaining list issues.

33. I will remain seized of these proceedings.

1350-98-R Chamoun Azzam, Applicant v. Canadian Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) and its Local 27, Responding Party v. Siemens Electric Limited Automotive Systems North American Motor Operations Division (NAMO), Intervenor

Termination - Applicant, employer and trade union providing significantly different estimates of number of employees in bargaining unit in termination application - Board earlier inviting submissions from applicant as to reasons for the disparity - Applicant's counsel advising Board that its estimate made in good faith but that he had no basis to challenge the accuracy of employer's information - Board concluding that there were at least 600 employees in bargaining unit (as compared to applicant's estimate of 400 employees) and determining that less than 40 per cent of bargaining had expressed wish not to be represented by trade union - Application dismissed without a vote

BEFORE: *Brian McLean*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

DECISION OF THE BOARD; August 5, 1998

1. The applicant has applied to the Board under section 63 of the *Labour Relations Act, 1995* for a declaration that the responding party no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. This application was filed on July 15, 1998. The employees who are affected by this application are covered by a collective agreement between the responding party and Siemens Electric Limited.

3. The application filed in this matter indicated that there were 400 employees employed in the bargaining unit affected by the application.

4. The respondent trade union's Response filed in this matter indicated that there were 906 employees in the bargaining unit comprised of 678 active employees and 228 employees on lay-off. The intervention filed by the employer indicated that there were 913 employees on the seniority list, approximately 630 of whom were active employees, with the remainder laid off.

5. In view of the disparity which existed between the applicant's determination of the number of employees in the bargaining unit and the trade union's and employer's information, on July 24, 1998 the Board directed the applicant to provide submissions, if any, as to the reasons for the disparity.
 6. On July 30, 1998 counsel for the applicant wrote to the Board and advised that the applicant's estimate of 400 employees was a good faith estimate. Counsel also advised that the applicant has no contrary basis on which to challenge the accuracy of the list submitted by the employer.
 7. We find therefore that there is no dispute that there are at least 600 employees employed in the bargaining unit.
 8. Accordingly, it appears to the Board on an examination of the evidence before it, that less than forty per cent of the employees in the bargaining unit had expressed a wish not to be represented by the trade union at the time the application was filed.
 9. In the circumstances, the remaining issues raised by the respondent in its Response need not be determined.
 10. The application is therefore dismissed.
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3051-90-U Graham Smith, Allen Ouellette and Charles Wilburn, Applicants v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, Responding Party

Construction Industry - Damages - Duty of Fair Referral - Intimidation and Coercion - Remedies - Unfair Labour Practice - Board earlier finding that local union's operation of hiring hall violating duty of fair referral - Board also finding that union violated Act by threatening one applicant with charges if he looked into union's finances and by giving applicants written notice that they were being charged for unspecified violations of constitution - Board concluding that threats were reprisals imposed on applicants for exercise of rights under the Act - Board directing union to take all steps necessary to ensure that operation of hiring hall complies with section 75 of the Act as described in earlier Board decision - Damages for lost wages and pension contributions calculated and ordered - Board also directing union to provide each member with copy of Board notice summarizing outcome of Board proceedings

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *Graham Smith, Allen Ouellette and Charles Wilburn* for the applicants; *S.B.D. Wahl, Fred Marr and Greg Michaluk* for the responding party.

DECISION OF THE BOARD; July 23, 1998

1. This is an application filed pursuant to (what is now) section 96 of the *Labour Relations Act, 1995* (the "Act") alleging that the responding party (also referred to as the "union" or "Local 700" or, simply the "Local") has violated (what are now) sections 74, 75, 76, and 87(2) of the *Labour Relations Act, 1995* (the "Act").
2. These sections provide as follows:

74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

75. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

87. • • •

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

3. After some 35 days of hearing in what has been described as the first phase of this case, the Board concluded, in a decision dated April 10, 1995, [1995] OLRB Rep. Apr. 418 (hereinafter referred to as the "Phase I decision"), that the union's hiring hall system was inconsistent with and contrary to the terms of section 75 of the Act. In that decision the Board had examined the systemic aspects of the hiring hall administration in relation to a number of representative jobs in a period of almost two years (from January 1, 1990 to November 18, 1991). Some 200 different referrals were examined in sometimes excruciating detail.

4. As might be inferred from the use of the word "systemic", the Board's approach in this first phase of the proceedings was limited (with at times greater or lesser success) to an analysis of the hiring hall system itself. Thus, for example, the complainants' frequent assertions that they were the specific targets of ill-will and discrimination in the operation of the hiring hall were not part of the matrix of evidence canvassed in the first phase of the proceedings. Neither did the Board, again in the first phase of the proceedings, deal with the specific allegations that the union, in conduct explicitly directed at the complainants, had committed further unfair labour practices beyond the unlawful operation of the hiring hall.

5. In our April 10, 1995 decision we remained seized with respect to both issues of remedy flowing from the "systemic" violations we had found and, of course, with respect to issues of liability and, potentially, remedy in relation to those (essentially motive based) alleged violations not yet adjudicated.

6. Pursuant to their written agreement, the scheduling of any further hearing dates was deferred to give the parties an opportunity to meet with a Labour Relations Officer in an effort to resolve all outstanding issues.

7. Those efforts continued, but were ultimately unsuccessful.

8. In February of 1996 after hearing and considering the parties' submissions on the point, a majority of the panel (Ms. McDonald dissenting) ruled as to how the hearings ought to proceed. Essentially, we directed that *all outstanding issues* were to be dealt with (i.e. *all* issues related to remedy flowing from the Board's April 10, 1995 decision; *all* of the outstanding allegations not yet dealt with by the Board; and *all* issues of remedy in the event any further violations were found). The Board made it clear to the parties that, contrary to its frequent practice, it was not intending to (further) bifurcate the proceedings by remaining seized with respect to remedy or even quantum of damages in the event further violations were found. Thus, the parties were advised to insure that each and every piece of evidence relevant to every aspect of the case be placed before us in the course of the ensuing hearing days.

9. Some 16 days of hearing followed in the period leading up to May of 1997. Final written legal submissions were due in July of 1997 (although some supplementary submissions were directed by the Board after that date).

10. It is unnecessary for us to review or repeat the general observations we made in the April 10 decision regarding the conduct of these proceedings or the parties' ability to cooperate even for the limited purposes of completing these hearings. Suffice it to say that there was no appreciable improvement in the levels of rancour, distrust and suspicion evident in the hearing room on a daily basis.

11. We shall deal first with the alleged violations of various sections of the Act other than section 75. These were specifically pleaded by the applicants and were the subject of evidence before us. Before we deal with these specific allegations, a few comments of a more general nature are warranted.

12. The Board has spent considerable periods of time at close quarters with all of the participants in this matter. That, coupled of course with the significant amounts of evidence we heard about the operation and functioning of the union, its members and officials, has provided us with a fairly unique vantage point to observe what might be described as the culture or ethos of the Ironworkers trade in the Windsor area. It has been said that the industrial shop floor is not a debating society. This Board (differently constituted in *Centro Mechanical Inc.*, [1996] OLRB Rep. Sept./Oct. 762 at paragraph 48) has had occasion to observe, in the context of a construction union organizing campaign, that

... construction job sites are neither tea parties nor labour relations laboratories, and ... it is unreasonable to expect that employees will not be exposed to various social and other pressures, perhaps even severe pressures...

13. The rough and tumble atmosphere which may be characteristic of the typical industrial or construction work site is easily matched in the settings about which we heard considerable evidence. Neither the union hiring hall nor its regular monthly or other meetings are good sources of formation in the skills of diplomacy, tact or courtesy. Indeed, much of the behaviour exhibited in those settings might be seen to resemble the strutting of roosters at the ready, appearing to be eager for the always imminent (but rarely materializing) cockfight.

14. As we noted in our April 10 decision, there is a considerable history and a long simmering political battle between the applicants and the controlling forces of the union. For the most part, as we also noted then, it is not generally the function of this Board to intervene in or otherwise mediate, govern or resolve internal trade union disputes. Having heard all of the evidence in this case, it is now abundantly clear to us that the most significant aspect of this case relates to the operation of the union's hiring hall.

15. The complainants have opposed the union's administration, both with respect to the hiring hall and other more general issues, in varieties of ways over a period of years. Their internal political efforts have been largely unsuccessful. It can come as no surprise to anyone that, in the course of those efforts to oppose both the administration of the union and the established manner of the operation of the hiring hall, the applicants have politically alienated themselves from both the leadership and significant portions of the membership of the union. There is, of course, nothing in the Act which requires union officials (or fellow union members) to be kind or polite or affectionate towards anyone, let alone towards persons understandably perceived as political enemies. Heated discussions, strenuous vocal opposition and, in the context of the Ironworker culture, utterances which perhaps can only charitably be described as unfortunate are hardly unexpected. So long as these sorts of exchanges, however charged and intense they may be, are essentially within the range of reasonably acceptable political battling and controversy, the participants cannot expect to call on the Board to provide support for one side or the other. However, where such conduct ventures beyond those limits and strays into prohibited areas (e.g. where penalties with clear employment related consequences are visited on a party *because* of a legitimate exercise of statutory rights), Board intervention can be expected.

16. As the dividing line between the types of permissible and prohibited conduct just described is not always crystal clear, it may be helpful to select examples taken directly from the allegations which are the subject of our current inquiry. Perhaps the most graphic example of conduct properly beyond the reach of this Board can be found in one of the complainants' allegations against Mr. Zucchet, the union's hiring hall dispatcher. On a day when the complainants, accompanied by counsel, attended at the union hall for the purposes of meeting with union officials and reviewing certain documents, it is alleged that Mr. Zucchet threatened to line them up against the wall and shoot them. The union did not seriously dispute that statement, or one reasonably similar to it, was, in fact made.

17. At first blush a threat of physical harm is one which the Board will certainly examine closely (though, of course, not all such threats - even if they may otherwise raise concerns of criminal law enforcement - are necessarily unfair labour practices). But the initial revulsion with which one may react to this specific pleading is certainly dissipated after a consideration of the evidence as a whole.

18. Perhaps most significant in this regard was Mr. Wilburn's candid concession that Mr. Zucchet could have been "poking a little fun" - as he put it - "we all know Mr. Zucchet."

19. There is little doubt that by this stage in July of 1991, the complainants were well known to Mr. Zucchet not only as dissidents within the local but also as litigants before this Board in this application. Indeed, Mr. Zucchet made his comments just shortly prior to the commencement of a meeting related to the hearing in this matter. The hearing was scheduled to continue within a matter of days after the meeting.

20. And while Mr. Zucchet's comments can hardly be interpreted as encouraging the complainants or supporting them in their cause, we are equally unpersuaded that there was any element of real threat or menace contained in those comments. The comments undoubtedly display Mr. Zucchet's (and perhaps even the union's) general opposition to the complainants and their cause. In the circumstances, we are satisfied, however, that Mr. Zucchet's comments were little more than a feeble attempt at humour and certainly do not constitute an unfair labour practice.

21. At the opposite end of the spectrum defined by the events detailed in the pleadings and the evidence, is the conduct of Mr. Poisson who, at the time, was president of the union.

22. This application was initially filed in February of 1991. At the March general membership meeting, Mr. Marr chose to read the application in its entirety to the assembled ironworkers' membership. At that same meeting, Mr. Poisson assured the membership that he would be charging all three complainants and "tossing them out" of the union.

23. Each of the complainants was subsequently advised, by letters dated April 1, 1991 from Mr. Poisson that they were being called to appear before the executive board of the union. The letters each complainant received were on union letterhead and were signed by Mr. Poisson in his capacity as president of the union. Each of the letters included the following:

Please accept this as notice that you are being charged for Violations of the Constitution of the International Association of Bridge, Structural and Ornamental Ironworkers.

I hereby order you to appear before the Executive Board on April 15th, 1991...

Failure to attend will attest to your guilt and you will be tried in absentia.

24. It appears that nothing concrete ever came of these "charges". Both Mr. Ouellette and Mr. Smith responded to Mr. Poisson, in writing, disputing the validity of the charges under the union's constitution. Sometime prior to the scheduled executive board meeting, the claimants received telephone calls from Mr. Poisson advising them to disregard the "charges". By April 15, 1991 the three complainants confirmed, in writing, that the "charges" or "allegations" against them had been withdrawn and that they were no longer required to appear before the union's executive board. Nothing further happened in relation to these "charges". Neither Mr. Poisson nor the union demonstrated the courtesy to formally withdraw the "charges" or to provide any kind of explanation as to what had transpired.

25. Mr. Poisson did not testify in these proceedings and we thus have no direct evidence from him regarding his motives in initiating this process against the complainants. Neither does the evidence of Mr. Marr or Mr. Michaluk shed much light on the matter. For while they both indicated some personal disapproval of Mr. Poisson's conduct, they both purported to know little about what Mr. Poisson had done or why he had done it.

26. In these circumstances we have no hesitation in concluding that Mr. Poisson's purported initiation of charges against the complainants was an unfair labour practice. In the absence of any other proffered explanation, the most, and perhaps the only, reasonable inference to draw from the essentially undisputed facts is that the union, through its president, was seeking to impose a penalty on the complainants because they had made an application under the Act. This conclusion emerges readily from the timing of the events - Mr. Poisson's letter of April 1st follows closely on the heels of his comments at the membership meeting at which the freshly filed complaint was read and discussed. It also is effected on the eve of the commencement of the hearing into the complaint (the first day of hearing in this matter was scheduled for and held on April 3, 1991 before a different panel of the Board). Again, in the absence of any other explanation, we are satisfied that there was a causal connection between the applicants' filing of their complaint and the purported initiation of charges under the union's constitution. This is precisely the kind of reprisal prohibited by section 87(2).

27. It may be useful to clarify one manner in which this specific violation may be distinguished from many of the other alleged violations which were the subject of this complaint. Following up on some of our earlier comments, conduct indicating opposition to the complainants and their cause may be distinguishable from unlawful conduct by which the complainants suffer reprisals or even the threat of reprisals as a result of their lawful exercise of statutory rights. The right of the union to, for example, defend its operation of the hiring hall (as it did, albeit unsuccessfully, in this case) is not necessarily dependent on the legality of the hiring hall operation. In other words, while the operation of the hiring hall may ultimately have been found to be unlawful, the union's defence of the hiring hall operation in the process which lead to that determination does not constitute an independent breach of the Act. On the contrary, just as the complainants have and have successfully exercised their rights to challenge the operation of the hiring hall, so too does the union have the right, at least until the Board makes its

determination on the question (or makes a relevant interim order), to defend its manner of operating the hiring hall.

28. To return again to the dividing line between permissible and prohibited conduct in this case, not all union conduct in opposition to or demonstrating opposition to the applicants and their cause is, by simple virtue of that demonstrated opposition in interest, unlawful. So long as the union's opposition to or even dislike of the complainants did not lead to violations of statutory obligations (viz. the duties under sections 74 and 75) or to reprisals or intimidation aimed at penalizing or preventing the exercise of the complainants' statutory rights, the union was free to resist the applicants' political initiatives. The political climate and potential political change within the union are the more appropriate regulators of such activity.

29. With this context and background it is now possible for us to begin to review some of the other specific alleged violations in further detail. The applicants' pleadings disclosed in excess of twenty separate events, or series of events, which were alleged to constitute unfair labour practices and discrete violations of the Act.

30. With the full benefit of hindsight which comes from now having heard all of the evidence, the Board (had it been in possession of all of this information at the time) may well have proceeded differently in this matter. As will become evident, the force of many of the union's submissions about how we ought to have proceeded is now much more evident. At the time, however, the Board was faced with a significant number of alleged violations, many of which involved charges of extreme threats. At the end of the day, however, very few of these allegations have been proved. Further, in the relative scheme of things, the allegations which have been established are, at least relative to the "total package" of allegations, fairly marginal.

31. In the days leading up to the calling of evidence in relation to the final phase of the proceedings, there were some tentative indications from the complainants that they might not be proceeding in relation to all of the pleaded allegations. In view of that, the Board directed the applicants to advise the Board and the union as to which allegations would be pursued. In what may have been little more than an inability to "let go" or to make productive contributions to the adjudicative process (the latter being a disability which may have afflicted all of those who had the misfortune to participate in this case), the applicants, when the time came, simply advised that they were proceeding with everything. As a consequence, of course, the union (and obviously to a lesser extent, the Board) prepared to hear evidence in relation to all of the allegations. We have already indicated that few of those allegations have been proved. But while there were instances in which we have had to assess conflicting evidence in concluding that the allegations were not made out, there were a significant number of instances in which no evidence whatsoever was called to establish the pleaded allegations.

32. The pleadings alleged that the complainants were threatened with imprisonment; that Mr. Poisson threatened that there would be "dead bodies"; that other death threats were made by Mr. Poisson, Mr. Stewart and by a "large unknown" "biker"; that Mr. Marr threatened the applicants with a beating; that Mr. Zucchet displayed a firearm in an effort to threaten Mr. Wilburn; and that Mr. Michaluk made statements to the effect that he would devote his term in union office to "getting rid" of the applicants. These are grave allegations. The evidence, however, comes not even remotely close to establishing them. Indeed, in view of the general insufficiency of the evidence, only a small minority of all of the allegations pleaded warrant any significant attention on our part.

33. All of this is not to say that the applicants' allegations are utterly devoid of any merit. As will become clear, of the 20 or 25 alleged violations, we have found 3 instances (2 of which are arguably part of the same transaction) of unlawful conduct. As will also become clear, however, beyond

declaratory relief, these violations add little to the remedial exercise which was already required as a result of our prior award.

34. In other words, both the parties and the Board may well be left with the unsettling sensation that much of the last 16 days of hearing and the consequent significant delay associated with same have contributed little of substance to the process and could easily have been avoided. To the extent that the parties (and particularly the applicants) may be frustrated by the delay in reaching a final conclusion in this matter (and there have been inordinate delays to which all of the participants - including this Vice-Chair - have contributed), there is considerable irony, though little comfort, in the observation that the final phase of these proceedings has been unduly protracted by the applicants' insistence that the matter proceed in relation to allegations they were largely unable (and, in some instances, apparently had no intention) to prove.

35. This brings us finally to the allegations about which sufficient evidence was called to warrant some further consideration. We shall deal with these in chronological order.

36. The complainants allege that on or about February 20, 1990, they were advised by their "representative", Mr. Frank Kutyma, that:

... Greg Michaluk would be calling the Workers' Compensation Board for the purpose of reporting Graham Smith to it as being available to work and not one who is entitled to compensation within the meaning of that legislation. Before leaving, Mr. Kutyma dropped a .38 calibre bullet on the floor in front of the complainants.

37. The evidence fails to establish any violation of the Act on the part of the union in relation to this allegation.

38. First of all, although Mr. Kutyma subsequently became a member of the union's Executive Board, at the time of these events he was not an official of the local and therefore his conduct at the time cannot be viewed as the conduct of the union. On the contrary, as both the pleadings and the evidence suggest, Mr. Kutyma was acting at the behest of and, at least to a limited extent, on behalf of the complainants. Thus, while allegations relating to firearms or even ammunition may attract a certain degree of scrutiny and attention, it quickly became clear that there was a much more benign quality to these events than one might first think. Indeed, even Mr. Ouellette essentially acknowledged that there were no sinister motives and he did not feel at all threatened.

39. Second, we are unable, on the basis of the evidence before us, to conclude that Mr. Michaluk has violated the Act in relation to this allegation. We heard no direct evidence from Mr. Kutyma; the only evidence we heard from the complainants was their own sometimes inconsistent multiple hearsay accounts of Mr. Michaluk's statements. The latter denied ever intervening or even saying that he would intervene with the Workers' Compensation Board in relation to Mr. Smith's benefits. Whatever Mr. Kutyma's warning to Mr. Smith may have been, we are not satisfied that it was either a message from the union or that it established any nefarious intention on the part of the local or anyone acting on its behalf.

40. This aspect of the complaint is dismissed.

41. In the latter part of March of 1990, the complainants attended a meeting at the union hall. This was an informal meeting held to discuss some of the complainants' concerns. Mr. Marr, the union's business agent at the time, was in attendance. The complainants allege that a number of the statements he made at the meeting constitute unfair labour practices. Although there is conflicting evidence about what exactly transpired at the meeting, it was not disputed that, at one point, Mr. Marr extended an invitation to Mr. Ouellette to "step outside" to the parking lot to further their fruitful exchange. The

precise details and context of the invitation were the subject of some dispute. However, even on a version of the facts most favourable to the complainants' case, we are not persuaded that Mr. Marr's invitation, as irresponsible and ill-advised as it may have been, was a violation of the Act. First of all, unlike the classic situation of intimidation, there is no explicit suggestion of what advantage or other result was being sought through the vehicle of the threat (see the discussion on this point in the case of *Stratford v. Lindley*, [1964] 2 All E.R. 209 (C.A.) cited in *Keith MacLoed Sutherland*, [1983] OLRB Rep. July 1219). But even if one might be able or prepared to infer the result being sought and even to infer that it bears some relationship to the exercise of rights under the Act, we are, having considered the evidence as a whole, simply not persuaded that there was any real intended or understood threat of violence in Mr. Marr's comment. While one can and should certainly expect better of a responsible union official, loose and unrestrained talk are not, in this factual context, unlawful.

42. We come, however, to quite a different conclusion regarding another of Mr. Marr's statements at the same meeting. Although their specific versions varied marginally, each of the applicants testified that Mr. Marr threatened to have them charged if they looked into the union's finances. Although Mr. Marr was given the specific opportunity to deny these allegations, his response was somewhat equivocal - he preferred to say he didn't think he had said those things and to immediately move to a discussion of the efficacy of any efforts to charge a union member in those circumstances.

43. While perhaps not as severe as Mr. Poisson's conduct about a year later (in April of 1991, see paragraph 21 above), the nature and effect of Mr. Marr's statements are similar in kind. Further, at the time of the statements, the applicants had a pending matter before this Board regarding financial information they were seeking from the union (the application in Board File 1754-90-M was filed in October of 1990 and was dismissed in a decision dated October 24, 1991 after the Board (differently constituted) determined that a settlement of the matter had been effected). Like Mr. Poisson's remarks, nothing concrete ever came of the comments. No formal charges were ever laid and no specific consequences followed on Mr. Marr's comments. Despite that, this Board must be concerned when union officials are prepared to invoke the threat of internal trade union discipline processes as a response to the legitimate exercise of rights under the Act.

44. In May of 1990 the complainants attended a meeting of the union's executive board. As Mr. Wilburn put it "we sort of invited ourselves". They were at the meeting for no more than 15 minutes before they were asked to leave. We heard the evidence of 5 eyewitnesses to this event. Their accounts varied dramatically, particularly with respect to the conduct of Mr. Michaluk at the meeting. We have found (as has often been the case in these proceedings) Mr. Wilburn's evidence to be the most reliable and are satisfied that his account (at least relative to the others) most closely reflects what actually transpired at the meeting.

45. At the meeting the complainants, Mr. Smith acting as their chief spokesperson, raised several issues. These included issues which they had unsuccessfully raised on the floor of the general membership meetings. Mr. Smith raised several matters and may well have raised the possibility of the imposition of trusteeship on the local, a suggestion which could hardly have endeared him to the assembled union leadership. In any event and whether or not any reference was made to trusteeship, Mr. Smith did take it upon himself, in what he may have seen as furthering his arguments, to read aloud from the union's constitution. This may have been the immediate catalyst for Mr. Michaluk's exasperated response. It was not disputed that he uttered words to the following effect directed at Mr. Smith: "stop this legal shit or I'll put my size 10s [a reference to his boots] up your ass".

46. Mr. Smith's account of the event included Mr. Michaluk's menacing advance and fist waving. We have found Mr. Smith's account to be exaggerated and his protests of fear of impending physical harm to be disingenuous. While Mr. Michaluk may well have engaged in some fist clenching,

we are satisfied that he did not wave his fist in any menacing fashion in Mr. Smith's direction. Mr. Smith was able to respond with his own reference to firearms. This was another example of perhaps puerile exuberance exhibited by many of the participants. As Mr. Wilburn acknowledged, however, this was neither a life threatening situation nor one warranting the intervention of the police. It was more in the nature of political debate within the ironworker culture. It was not unlawful under the Act.

47. As already indicated, the complainants filed their application in Board File 1754-90-M in October of 1990. The next regular union membership meeting was held on November 6, 1990. The Minutes of that meeting disclose that the following motion, moved by Don Stewart and seconded by Terry Murphy, was carried:

That anybody wishing to pick up their initiation fee will be issued a cheque from this office in exchange for their membership card.

48. The motion was clearly aimed at the three complainants who, in view of their recent initiation of proceedings against the union, were being invited to withdraw from membership. Both Mr. Michaluk and Mr. Poisson spoke to the motion. Mr. Michaluk questioned the loyalty of members of the union who would partake in the kind of conduct in which the applicants had engaged. He went on to suggest that the applicants were not real members of the union and that they might wish to consider Mr. Stewart's invitation. Mr. Poisson escalated the debate to another level by suggesting that the applicants would be expelled from the union after they failed in their application.

49. With one possible exception, nothing concrete appears to have resulted from the motion or accompanying discussion.

50. However inappropriate or unproductive it may have been, the Board is not prepared to censure the conduct of union members involved in the discussion of this particular motion. It was not suggested that either Mr. Stewart or Mr. Murphy were, at the time, officials of the union or acting on its behalf. Their conduct cannot therefore result in a finding that the respondent union has violated the Act. (We take the opportunity to note that a similar conclusion is necessary in relation to another motion Mr. Stewart had successfully brought to membership at the April 1990 meeting - a motion about which we heard some evidence despite the absence of any reference to it in the pleadings.) Similarly, while Mr. Michaluk (who subsequently was elected president of the local and later became its business agent) was a member of the union's executive board at the time, we are not persuaded that his conduct was in an official union capacity or that it can be seen to have been the conduct of the union for the purposes of this application.

51. Mr. Poisson's conduct is another matter. Mr. Poisson was the president of the local at the time. In that capacity and at the time he made his contributions to the discussion he was running the meeting. As we have already seen this was not the last time Mr. Poisson would engage in thinly veiled threats directed at the applicants and following upon their attempt to vindicate their statutory rights. Indeed, we see this particular intervention as similar to and part of the subsequent equally unlawful threat made some five months later. This violation of the Act may be viewed as part of the same transaction which culminated in the written notices of "charges" forwarded to the complainants the following April.

52. Among the complainants allegations is the claim that the union, in or around July of 1991, violated its statutory duty to fairly represent its members by failing to advance two specific grievances on behalf of Mr. Smith.

53. The specific and intricate facts pertaining to each of these grievances were in dispute between the parties. The broad details of the relevant events, however, are reasonably straightforward.

We have not found it necessary to resolve all of the factual disputes in order to dispose of this portion of the complainants' claim.

54. In both cases, Mr Smith was referred to a job. In the first instance he commenced working at Niagara Riggers and Erecting ("NRE") on July 3, 1991; in the second he began working for General Riggers ("GR") on or about July 9, 1991. In both cases Mr. Smith's tenure with the particular employer was exceedingly brief. The reasons, circumstances and characterization of the severance of his employment relationship are, in each case, the subject of dispute between the parties.

55. Mr. Smith reported for work at NRE on the day following the 1991 union elections which had been held at the hiring hall. Mr. Michaluk had just been elected president of the local (having defeated Mr. Poisson by a margin of 154 to 97). (Also of note was the defeat of Mr. Wilburn by Mr. Marr for the position of business manager by a margin of 37 to 212 as well as Mr. Smith's inability to secure a position on the ballot, a matter to which we shall briefly return). Despite his recent election victory, Mr. Michaluk, for several months to follow, continued in his employment position as a working foreman with NRE. Indeed, it was with Mr. Michaluk that Mr. Smith had the bulk of his relevant interactions at the job site on July 3, 1991.

56. Mr. Smith left the job on that day and, without advising anyone of his decision, simply never returned. His view is that Mr. Michaluk assigned him duties which were beyond the scope of his medical restrictions. Indeed, it appears that this was the first work Mr. Smith had performed in the trade since sustaining an injury some three years earlier. However, we are less than persuaded that the precise nature of his subsisting limitations were known to Mr. Michaluk at the time. Indeed, while questions of Mr. Smith's WCB status and the precise nature of his limitations are matters to which we must return, we confess, despite the days and days of hearing in this matter and the voluminous amounts of material filed, that we are less than confident that we have been provided with a comprehensive presentation of all of the relevant facts.

57. In any event, and whatever prompted Mr. Smith's departure, it was not disputed that he quit (or, at a minimum is deemed to have done so by virtue of having neither reported to work nor contacted the employer for two subsequent working days).

58. The facts surrounding his brief tenure with GR bear some similarity. It would appear that his assignment was, at least initially, only for a two day job. After working for 2 days, however, Mr. Smith was asked if he could continue for another week. He replied affirmatively but advised that on the next day, July 11, 1991, he had a meeting scheduled with his lawyer (the meeting was in relation to the July 18, 1991 hearing date scheduled in this matter). The employer advised him that was fine and that he should come to work when he was done. Mr. Smith did not report for work the next day. Further, when he returned home from meeting with his lawyer, he received correspondence from union counsel advising that job referral documentation material dating back to February of 1990 would be available for the complainants to review at the hiring hall the following day, July 12, 1991. Mr. Smith attended at the hiring hall to review the documents and reported to work on the afternoon of July 12. From the time he left work on the 10th to his return on the afternoon of the 12th, Mr. Smith took no steps to advise the company either that his meeting with the lawyer had lasted the entire day or to provide any other explanation for his failure to attend at work on the 11th. Similarly, he provided no advance notice that he would not be at work until sometime in the afternoon on the 12th.

59. Upon reporting for work on the 12th, Mr. Smith was advised that he was being laid off. At his request, a notation to that effect was entered on his referral slip by Jim Moore, a foreman (and a member of the union's executive board) at the site. Mr. Smith inquired about his final pay and was told it would be mailed to him.

60. By July 15, 1991, Mr. Smith had not received his final paycheques from either NRE or GR. As a result he prepared two documents each of which he headed "Formal Grievance.." and filed them at the hiring hall. The documents set out what Mr. Smith viewed as the salient facts. In the grievance against NRE he claimed pay for the work he had done as well as waiting time at 8 hours per working day from July 12 (the date by which he asserted he should have been paid) until receipt of his final pay. The grievance against GR claimed pay for work done, a further 4 hours pay for the day of his lay off (since Article 6.1 of the collective agreement prohibits a lay off during the first 4 hours of a shift) as well as pay for waiting time.

61. Within a matter of days Mr. Smith received payment for hours actually worked and his records of employment from both employers. He did not receive any pay for waiting time or, in the case of GR, for 4 hours on the day of layoff.

62. By letter dated July 24, 1991, Mr. Marr advised Mr. Smith as follows:

I am in receipt of your complaints regarding General Riggers and Niagara Rigging and Erecting.

With regards to General Riggers, I met with your foreman on July 15, 1991 and then spoke to his general foreman by telephone on July 16, 1991. The position of the company is that you did ask for time off on the Thursday and you were expected to return to work on Thursday afternoon. You did not return until Friday afternoon to pick up your tools. The company is satisfied that you voluntarily quit the job.

With regard to Niagara Rigging and erecting, I met with your foreman on July 15, 1991 and informed him that regardless of your reason for quitting the job, they may owe you some waiting time if the cheque was not mailed by the proper date. On July 16, 1991 I drove to the job site to settle the matter. I was informed that you made no attempt to pick up your pay, or tell the company where to mail it. They have cheque writing capabilities on site, and they assure me that they would have paid you any time you wanted.

I am advised that you have been paid in full for the work you performed at both jobs, and I can see no justification for Local 700 to pursue these matters further, as the cost would outweigh the return in both dollars and this Local unions reputation.

Based on the information I have gathered, I feel our chances of success would be minimal.

63. Mr. Smith would have us conclude that the union acted in a fashion which was arbitrary, discriminatory or in bad faith when it failed to advance his grievances any further. There are several reasons why we find ourselves entirely unable to arrive at such a conclusion. Some of these relate to the apparent merits of Mr. Smith's claim and our conclusion that the union's assessment (i.e. that chances of success were minimal and that the costs of proceeding far outweighed the possible return) was reasonable in the circumstances. Others relate to Mr. Smith's conduct in these matters.

64. In assessing the claims Mr. Smith wished advanced to arbitration, one cannot lose sight of certain factors. First, it must be emphasized that, despite the conflicting evidence regarding the circumstances of the terminations (evidence, as we have already indicated, we have not found necessary to fully resolve or reconcile), the fact of the matter is that Mr. Smith never sought, either in relation to the employer, the union or before this Board, to claim reinstatement or any similar remedy. He did not and has not sought to challenge the fact of his terminations, but merely the consequences. In other words, the remedies he sought were at all times limited to damages in amounts which, in the general scheme of these proceedings, are relatively marginal.

65. In that regard and had these matters been referred to arbitration, it is entirely possible that the chief factor impressing the arbitrator might have been the sheer gall involved in advancing some of the claims. For example, assuming Mr. Smith was laid off from GR, his claim for four hours pay on the

day of the layoff might be difficult to advance when he did not even turn up for work on that day until well after the four hours for which he now claims pay and during which a layoff is prohibited had elapsed (he wasn't at work to have the benefit of not being laid off). Similarly, it is not difficult to understand that the union might experience some pangs of trepidation in arguing that a member who simply never returned to work without notifying the employer of his intentions ought, whatever the collective agreement might say, to be paid waiting time while the employer determined that he had (or was deemed to have) quit. Similar equities (or lack thereof) arise in relation to Mr. Smith's absence from work at GR.

66. Other aspects of our assessment of this portion of the claim relate to Mr. Smith's conduct and his own motives. For example, we heard significant evidence relating to whether Mr. Smith had been laid off from or had quit his employment at GR (a fact which would be material to his claimed 4 hour protection from layoff). Mr. Smith testified that although his referral slip bore a notation indicating he had been laid off, the record of employment he subsequently received indicated that he had quit. He further testified that after he had begun his efforts to grieve the matter, a representative of the company told him that because he had sought to initiate a grievance ("filed paper") the employer had determined to alter its position. If that is true (and, again, it is unnecessary for us to determine), it would clearly have been a relevant fact for the union to consider. Indeed, in the face of such an allegation, the union (or, indeed, Mr. Smith himself) might have wished to consider the possibility of filing an unfair labour practice complaint against the company. In that context, we find it extremely curious that Mr. Smith made absolutely no effort to communicate this information to Mr. Marr who, as Mr. Smith was no doubt aware, would have been the union official directly charged with administering the carriage of grievances or Board matters.

67. Frankly, Mr. Smith's calculated withholding of information in this instance is consistent with his approach to these two purported grievances and his subsequent claim of unfair representation by the union. Mr. Smith sought to make much of his claim that Mr. Marr made decisions about his grievances without properly or fully consulting Mr. Smith and getting his version of all of the relevant events. But even if there is some truth to this claim, it is at least equally true that Mr. Smith studiously avoided providing information to Mr. Marr. Mr. Smith put his information in writing and filed it with the union and (apart from a passing conversation on one of the hearing days in this case) made no efforts to meet or speak to Mr. Marr about the grievances. Mr. Marr conducted his own investigation and made inquiries of company officials. He then communicated to Mr. Smith, in writing, his view that the chances of success would be minimal. However, while the view expressed by Mr. Marr in that letter was fairly unambiguous, there is nothing in it which explicitly indicates that some final and irrevocable decision had been made regarding the grievances. In any event, had Mr. Smith been persuaded that Mr. Marr's conclusions were based on erroneous and distorted facts (or that at least one of the employers had acted out of questionable motives), there was nothing to prevent Mr. Smith from communicating that information. He chose not to.

68. It seems clear to us that Mr. Smith was more interested in maximizing his arsenal of allegations against the union than he was in advancing or resolving the issues arising in his purported grievances. His ability to tell this Board that Mr. Marr acted in the absence of relevant information was apparently more important to Mr. Smith than insuring that Mr. Marr did indeed have all of the relevant information in his possession.

69. Mr. Smith provided another example of that kind of tendency in his evidence about the grievances. When asked why he never returned to the NRE site even to simply pick up his pay, Mr. Smith claimed that he was deterred by an apprehension of physical contact with Mr. Michaluk; he didn't want any "size 10s up my ass". This response was a dramatically striking display of disingenuousness. There was absolutely nothing in anyone's evidence to objectively support any apprehension of

any physical contact between Mr. Smith and Mr. Michaluk at the NRE site. We have already concluded that there was no real menace in Mr. Michaluk's unfortunate comment when it was made in May of 1990. And even if Mr. Smith may have felt differently about it at that time (a fact we frankly doubt), to dredge up and rely on the comment over a year after it was made and in the absence of any further suggestion of physical harm was little more than a desperate attempt to deflect attention from the question posed and did little to solidify our confidence in the motives of the witness.

70. In short and as regards Mr. Smith's efforts to advance grievances, we are satisfied that the union's decision to take no further steps in relation to those grievances was a reasonable one in the circumstances. There were disputed facts, the legal entitlements under the collective agreement were less than certain, the claims being advanced were relatively marginal (certainly when compared with either claims for reinstatement or the costs of proceeding). We are also satisfied that, in these circumstances, Mr. Marr was properly entitled to consider the objective of maximizing local hirings by a non-resident contractor (NRE) on a significant job and his understandable desire to avoid unnecessarily alienating that employer.

71. In all of the circumstances we are not persuaded that the union's decision to not advance the grievances was a violation of the Act.

72. We have already briefly referred to the fact that elections to various union positions were held in July of 1991. Mr. Smith wished to stand as a candidate in that election. He was successful in securing a nomination. However, when the roster of members nominated for office was reviewed by the International, the local was advised that two members, Messrs Smith and Dumeh, were ineligible for office because neither met the technical requirements of 24 continuous months as members in good standing. It would appear that at least once in the relevant period Mr. Smith was late in paying his dues, thus interrupting his period as a member in continuous good standing.

73. Mr. Smith appears to have been well aware of his technical ineligibility. As early as March prior to the July 1991 election he began a series of correspondence and appeals to the International seeking relief from the technical requirements of the constitution and the requisite approval from the International regarding his candidacy. His request was considered by the General Secretary of the International, then by the General President and, finally, by the International's General Executive Board. This series of appeals and further appeals commenced in March of 1991 and culminated on the eve of the election in which Mr. Smith sought to be a candidate. His efforts were unsuccessful and his name did not appear on the ballot.

74. The complainants have alleged that officers of the Local refused to allow Mr. Smith to run for reasons that did not prevent Jean Godard from running in the same election.

75. We are not persuaded that these events and Mr. Smith's inability to stand for office constitute an unfair labour practice. First of all, it was not disputed that, on a strict application of the terms of the constitution, Mr. Smith was indeed ineligible. Second, neither was it disputed that the decision to relieve against the strict application of the constitution was in the hands of the International and not the local (and it is, of course, the local who is said to have violated the Act).

76. Finally, we do not find the evidence regarding Mr. Godard to be particularly helpful. It appears that Mr. Godard (whose initial ineligibility to run for office was for reasons comparable to Mr. Smith) sought and secured the local's assistance in seeking and obtaining approval from the International for him to stand as a candidate despite his apparent ineligibility. Indeed, on directions from the local executive board, Mr. Marr wrote to the International on Mr. Godard's behalf. In the result, Mr. Godard was permitted to stand for office. We are not persuaded, however, that Mr. Marr's failure to write a similar letter on Mr. Smith's behalf was an act of discrimination or bad faith or otherwise

improperly motivated. The simple fact is that neither Mr. Marr nor any other official of the local was ever asked by Mr. Smith to intervene in any fashion on his behalf. And while we may be prepared to accept Mr. Smith's evidence that he was unaware that any such option was available, we just do not see how it is possible, in the circumstances of these events, to find that the union has violated the act because Mr. Marr failed to do something that no one requested that he do.

77. In summary with respect to all of the allegations other than those pertaining to the operation of the hiring hall, we are persuaded that Mr. Marr's threats to "file charges" if the applicants looked into the union's finances and Mr. Poisson's similar threats (taken, in his case, somewhat further than Mr. Marr) which attended the filing of the instant (as well as a previous) application were both unlawful instances of intimidation or coercion aimed at stifling the exercise of the applicants' statutory rights. As such the conduct in question was in violation of section 87(2) of the Act and we so declare. Insofar as all of the other allegations (other than those relating directly to the operation of the hiring hall), this complaint is hereby dismissed.

78. We are not, however, persuaded that, in respect of the violations of section 87(2), any remedy beyond a declaration is either necessary or appropriate. For while the conduct was undoubtedly unlawful, it is clear that no real or significant damage was caused. The complainants were not deterred in proceeding with either their efforts to secure financial information or the filing of this application. Had the complainants been successful in proving many or even some of their more grave motive-based allegations, the Board's approach to remedy in this case might have been different. The complainants have alleged that they have been the specific targets of the ill-will and bad-faith of the union and have suffered reprisals for having exercised their statutory rights. Subject to two marginal exceptions, they have failed to prove that theory of the case before the Board. In those circumstances, we are satisfied that (again apart from declaratory relief) the remedy provided in relation to the improper operation of the hiring hall (a matter to which we shall next turn) is adequate in respect of all violations found in this case.

79. There are significant disputes between the parties regarding the quantification of damages arising from the improper operation of the hiring hall. Indeed, the union's first position is that, notwithstanding the violation of the Act, damages are an inappropriate remedy in the circumstances of the case. Alternatively, the union advances several different arguments which, if accepted, would lead to a significantly reduced award of damages as compared to that sought by the applicants.

80. The union argues that the application has already served its purpose. It has now become clear that the union's longstanding manner of administering the hiring hall is "substandard". The union must therefore alter its referral procedures. It will do that. Indeed, the Board has heard some evidence that process was begun even before any violation of the Act was found. In those circumstances it would be inappropriate for the Board, by way of an award of damages, to "tax" the union which is simply the institutional representation of its membership. Put somewhat differently, given the applicants' largely unsuccessful efforts to change the hiring hall system through internal political means, the union should not suffer an award of damages for democratically giving effect to the will of its membership. Further, and in a related argument, the union asserted that the applicants have failed to establish the existence of any subjective ill-will towards them on the part of the union (a submission which, in view of the earlier portions of this decision, has been largely, though not entirely, vindicated). In that context, the applicants can have no unique claim to damages distinguishable from the claim of any other member of the union. In other words, to the extent that the applicants may have suffered any harm, it was as a result of the systemic deficiencies of the hiring hall. Those deficiencies would have impacted on all of the union's members, leaving the applicants with no special claim to monies which would come, ultimately, from the pockets of all of the people subject to the terms of the same hiring hall deficiencies.

81. We do not find these arguments to be persuasive. First of all, the union's assertion that its hiring hall practice is "longstanding" is something of an obfuscation. We do not wish to travel too far into territories already explored (cf. paragraph 157 of the Phase 1 decision) in our prior award. There may well be little doubt that self-solicitation is a practice of considerable vintage for which there have been generally high levels of historical support within the union and among its members. It was not, however, the mere existence of self-solicitation as a manner of referral which led to our finding that the union's administration of the hiring hall was unlawful. It was, rather, the extent of its usage. In that regard, we are not persuaded that there was (or was not) a correspondingly high level of support for its rampant and unbridled use. Further, even if the evidence demonstrated that unlimited self-solicitation was actively supported by an overwhelming majority of the union's members, this Board is loathe to insulate otherwise unlawful conduct under the veil of majority support. If such support cannot constitute a defence to a finding of liability, we see no reason why it should be permitted to shield the union from an award of damages.

82. There is perhaps some greater force to the union's argument that damages ought to be avoided where the effect of such an award will be to impoverish the union in a situation where all of its members (the people who will ultimately bear the liability) were subject to the same exigencies and deficiencies in the operation of the hiring hall. There are essentially two reasons why we find ourselves equally unable to accept this argument.

83. Although it may not be comprehensive (in terms of its application to *all* members), there is no shortage of data before us regarding referrals during the relevant parts of 1991 and 1992. It was neither suggested nor demonstrated to us that that data establishes that the union's unlawful practices had (even a relatively) equal impact on all of its members. Indeed (and we appreciate and will deal with the union's important submissions that there are various reasons for the disparity), when one compares the hours actually worked by the complainants with the average hours worked by all members, the latter outnumber the former by a factor in the range of 10 to 1.

84. Further, there is one (and likely only one) fashion in which the inordinate delay in the disposition of this matter actually assists our determination. The damages sought relate to events which transpired in 1990 and 1991. Of all of the members of the union, these 3 complainants are the only ones who are claiming damages in respect of the relevant time period. One might imagine the surreal quality that could attach to each and every member successfully claiming damages as a result of the unlawful administration of the hiring hall. Such claims could culminate in little more than multiple redistributions of money among the members resulting in little significant net change in the financial position of any individual member. It is, however, unnecessary to even contemplate such scenarios. While there is no formal limitation period on the filing of applications under the Act, it is virtually inconceivable that any other member of the union would be permitted, at this late date, to advance any claim in relation to the operation of the hiring hall in 1990 and 1991. Thus, the applicants' claim to damages is unique in at least one practical fashion - they are the only ones who have complained and successfully challenged the operation of the hiring hall.

85. We are satisfied that the applicants, to the extent that there is a causal connection between their paucity of hours worked during the relevant period and the unlawful operation of the hiring hall, are entitled to claim damages arising from the union's breach of the Act.

86. As will become clear, there are real difficulties in the quantification of damages owing to the complainants. The Board will not pretend that the assessment it is asked to perform is one which can be effected with any claim to pinpoint precision. Of course, the lack of a scientific model and the complete data necessary to quantify the damages in this case does not provide the Board with the option of declining to perform the assessment exercise. There are many reasons for the difficulties, including

a lack of comprehensive and reliable detail relating to events which now approach their decade anniversary. There are also some real difficulties involved in quantifying some of the reductions in damages which, as will be seen, the union has persuaded us ought to be applied.

87. Despite all these difficulties, there was little real dispute between the parties as to the starting point for an assessment of damages. That point is to be found in the case of *Joe Portiss*, [1983] OLRB Rep. July 1160 where, at paragraph 14, the Board offered the following:

The Board recognizes that no formula is absolutely certain. It is satisfied, however, that the justice of the case is more likely to be assured by broadly determining the average earnings of the general membership of the local, and comparing them to the earnings of the complainant, with some allowance for his personal circumstances and his conduct, particularly as the latter reflects any failure to mitigate his losses. The substance of the section 69 [now section 75] complaint is that Mr. Portiss was discriminated against; the thrust of the remedy should therefore be to place him, as far as possible, in a position comparable to that of the general membership.

88. That approach, referred to as the “*Portiss* formula” was adopted and confirmed in the case of *Luciano D’Alessandro and Donato Marianaro*, [1986] OLRB Rep. Aug. 1058. Although we shall be required to make some modifications, as did the Board in the *D’Alessandro* case, we too have taken the “*Portiss* formula” as our starting point.

89. Documents were filed by the union indicating, on a monthly basis during the relevant period, the amounts of field dues collected and the number of union members in the local. By dividing the total dues received by the hourly dues rate, it appears that in excess of 600,000 hours were worked by union members annually in each of the years 1990 and 1991. By further dividing the total number of hours worked by the number of (what the union described as) active union members, it appears that each active member worked an average of 1,052 hours in 1990 and 1,025 hours in 1991.

90. While essentially accepting the raw financial data giving rise to the calculations, the applicants challenged one aspect of the formula employed. In performing a similar calculation in the *Portiss* case, the Board applied a 10% discount to the number of union members to offset the fact that members who might have been inactive due to disability, employment in other industries, absence from the region or for other reasons were included in the total number of members, thus artificially deflating the figure for average annual earnings. In the *D’Alessandro* case no such discount was applied, but we note that the formula for computation was based on the number of *active* members. The applicants assert that the 10% discount ought to be applied in the instant case. We do not agree. The calculations performed by the union have already excluded honorary members and members on pension from the computation of average earnings. Further, a perusal of the number of such members as a proportion of the total members indicates that the proportion of such inactive members is far in excess of 10%. In other words, the union’s manner of calculation is more generous to the applicants than would be a calculation based on a 10% reduction of the total number of members. In those circumstances it would be inappropriate to apply any further reduction.

91. The union advances several reasons why, in its view, any damages payable ought to be reduced. Some of these apply to the applicants generally; others are specific to one or other of the applicants.

92. The union argues that any damages payable ought to be reduced by a factor of 50% because the applicants failed to engage in any self-solicitation. If self-solicitation is a recognized and legitimate manner of securing referrals to work, then the applicants have contributed to their own shortage of work hours by declining to engage in it. Further, if both the collective agreement and the Board’s phase I decision seem to suggest that self-solicitation can account for up to 50% of all referrals, then that is

the proportion by which damages ought to be reduced since the applicants, by not participating in any self-solicitation, have made that proportion of the work unavailable to them.

93. We are unable to give full effect to the union's submissions for a number of reasons. First, and perhaps foremost, the Board cannot help but recognize the inherent irony of the union's position. While the breadth of the complainants' case was always impressively wide, the Board has determined that the single most important and substantial issue raised in these proceedings relates to the role self-solicitation has played in the union's hiring hall processes. The complainants have successfully challenged the legality of the use of that process. Now the union asks us to reduce their damages for not having participated in the very process the extent of use of which was the legitimate subject of the complaint before this Board. In these circumstances the Board may not leap to embrace such an approach.

94. There are, however, other reasons for our reticence in this regard. First, we note that the applicants did not accept that they made *no* efforts at self-solicitation. The evidence discloses that some (relatively marginal) number of efforts to seek work directly from employers were made by the applicants.

95. Further, even if we were to otherwise accept in principle that damages ought to be reduced for failing to engage in self-solicitation, it is not evident to us what the quantum of such a reduction ought to be. In the phase I decision, we were critical of the union for having failed to make any meaningful distinction between self-solicitation and employer name requests. By asserting the 50% figure, it may be that the distinction continues to elude the union. While a figure of 50% self-solicitation might not offend the collective agreement or the Act, that would only be the case if the corresponding figure for employer requests were zero. It is the sum of employer requests *and* self-solicitations which is to make up one half of the referrals. Thus the range for self-solicitation would vary from 0% to 50%. There is certainly no reason to assume that 50% of all work is properly generated through self-solicitation. Further, even if 50% of all *referrals* were effected via self-solicitation, there is no reason to conclude that, as a consequence, 50% of all *work* would be so generated. There is simply no basis to conclude that there is any direct or predictable number of days of work associated with any given referral. And while the union for purposes of this argument might suggest that self-solicitation tends to give rise to longer term jobs, that argument is a sword with at least two edges. For if self-solicitation does tend to generate longer term jobs, then one might be able to conclude not only that the applicants may have abandoned greater work opportunities by not engaging in it, but also that they were deprived of disproportionately high number of work days through its unlawful use.

96. Finally, it is not clear to us that the hiring hall system, if properly operated, ought not to be able to reasonably accommodate a variety of different approaches and attitudes on the part of union members. There is simply no reason to conclude that members who may opt to rely on the collective agreement and the out of work list ought to assume that they will lose 50% of the work opportunities otherwise available to them. In theory, each time a member self-solicits, a corresponding opportunity for a referral off the list is generated. It may well be that the system can accommodate both those who choose to work by self-solicitation only and those who prefer to await referrals from the out of work list. Neither is there any obvious reason to either presume or doubt that the relative number of referrals or workdays generated by each approach will be the subject of gaping disparities.

97. In view of these considerations, we do not think it is appropriate to reduce the damages available to the applicants because they chose, by and large, not to engage in self-solicitation. Having said that, however, we should not be taken to have rejected the more general proposition (to which we shall return later) that the applicants have failed to take advantage of various work opportunities available to them and have thus, at least to some extent, failed to mitigate their damages.

98. The union argues that Mr. Ouellette ought not to be entitled to any damages for certain portions of the period in question. The union asserts that he was not entitled to hold his position on the out of work list for the relevant portions of the period.

99. Section 7 of Article XIX of the International union's constitution provides (in part):

Dues and assessments for each calendar month are payable on the first day of such month. A member who becomes more than (1) month in arrears with dues or assessment thereby breaks the continuity of the member's good standing...

100. The following paragraphs of *Section 2 Out-of-Work List* of Article XI of the local union's by-laws are also relevant:

- (A) Only members in good standing shall hold their position on the Out-of-Work list, to be referred to work, and any members requested by an employer or procuring his own job, will not receive a referral slip unless he is good standing, that is not more than one (1) month in arrears in payment of dues.

• • •

- (F) Any member who is in arrears with his dues when he is sent to work, or who is presently working, will be given up to his second pay day to come up with a payment of Ten Dollars (\$10.00) per day for each day he works to apply towards his ledger account until he is placed in good standing.

101. It was not disputed that for the following periods Mr. Ouellette was not in good standing (i.e. his dues payments had been in arrears for a period in excess of one month):

August 1, 1990 to August 8, 1990 (inclusive)

February 1, 1991 to February 24, 1991 (inclusive)

May 1, 1991 to May 21, 1991 (inclusive)

August 1, 1991 to November 6, 1991 (inclusive)

102. While it might appear at first blush that a member who is not in good standing should simply not reasonably expect to receive any referrals through the out-of-work list, the applicants argued that Mr. Ouellette's "not in good standing" status should not impact on his entitlement to claim damages. In support of this position reliance is placed on the language of the Constitution and By-laws as well as on the practice of the union.

103. The applicants suggest the relevant by-law provisions are "about as clear as muddy water". It is true that while paragraph (A) does seem to suggest that a member who is not in good standing does not retain his position on the out-of-work list, paragraph (B) seems to suggest that such a member (or at least one who is merely "in arrears") may be "sent to work". We do not, however, see these two provisions as creating the kind of irreconcilable interpretive conflict suggested by the applicants. In any event, for our current purposes and without attempting to provide any comprehensive interpretation of the provisions and their application in all cases, we are satisfied that the "first blush" impression, the one advocated by the union, is a reasonable one i.e. a member, such as Mr. Ouellette during the enumerated periods, who is not in good standing should not expect to maintain his position on the out of work list or to be referred to work from it. That is not to say, however, that it is simply impossible for such a member to receive a referral from the hiring hall. Where that does happen (and such a

member's claim to a referral, if such claim can even be said to exist, would obviously be subordinate to the claims of all other members on the out-of-work list) the by-laws contemplate that the member will use his earnings to restore his good standing within the period prescribed.

104. The applicants also assert that the practice within the union is to refer members not in good standing to work so as to provide them with the opportunity to repair their status. The union does not seriously dispute that such opportunities may be provided. Indeed (and although there may be some dispute about their number and quality), such opportunities were offered to and declined by Mr. Ouellette. The evidence provided to us does not allow us to arrive at any firm conclusions about the general practice of the union in the relatively residual and marginal category involved, namely referral practices in relation to members who are not in good standing. It follows, therefore, that it is impossible for us to conclude, as the applicants have urged, that Mr. Ouellette has been singled out for any special discriminatory treatment. We are satisfied that he, perhaps like others, was provided with some work opportunities despite his "not in good standing" status.

105. The applicants have complained generally that the work opportunities provided to them through the hiring hall were often short term undesirable jobs. In the specific context of Mr. Ouellette and his periods of not in good standing, we were never really provided with any further explanation for his work refusals (the precise number of which was in dispute). Perhaps even more so than in the general context, some explanation is warranted. Mr. Ouellette denied that he was aware at the time that he needed to be in good standing in order to receive hiring hall referrals. That denial rings somewhat hollow. Mr. Ouellette (and the other applicants) demonstrated his familiarity with the union's constitution, by-laws and the collective agreement on an ongoing basis. In particular, he acknowledged and identified the article of the collective agreement (2.1(a)) which allows a business agent to remove a member who falls in arrears from the job. We find it highly unlikely that Mr. Ouellette was unaware that his continuing dues delinquency would have a negative impact on his entitlement to hiring hall referrals. In those circumstances, we find it difficult to understand why he would not accept whatever limited work opportunity that might present itself (even short term or otherwise relatively undesirable) simply to repair his status and thereby allow him to be eligible for referral to the jobs he might have preferred.

106. In view of the above, we do not think it appropriate for Mr. Ouellette to be permitted to maintain a claim for damages in relation to any periods during which he was not in good standing and therefore not entitled to hold his position on the out-of-work list.

107. During (and preceding) the period in question (i.e. January 1, 1990 to November 18, 1991) Mr. Smith received various forms and amounts of workers' compensation benefits related to an injury/condition sustained and developed at work prior to 1990. The parties' attention for the purposes of issues relating to entitlement to and quantum of damages focused primarily on his receipt of total temporary disability ("ttd") benefits from January 1, 1990 until April 18, 1991 when, to use the language of the Workers' Compensation Board ("WCB") documents, his ttd benefits were "finalled". As of that latter date, Mr. Smith was assessed with an 11.5% permanent disability pension, which appears to have been subsequently and retroactively revised to 15%.

108. The union advances two different and alternative arguments in relation to Mr. Smith's receipt of ttd benefits. First, and put most simply, if Mr. Smith was totally disabled, as his WCB status suggests, then he could not have worked during the period and, consequently, suffered no damages as a result of the improper operation of the union's hiring hall. Alternatively, should the Board determine that damages are available, amounts received by way of ttd benefits ought to be deducted from any damages awarded.

109. We shall deal briefly with the second issue. Subsequent to the conclusion of the hearing in this matter, the union filed, without commentary, a recently released decision of the Ontario Court of Appeal in *White et al, Executors of the Estate of Dowsley v. Viceroy Fluid Power International Inc.* (1997), 34 O.R. (3d) 57. Not long after that decision was released, the Board (differently constituted) had occasion to reflect on the general issue in *Torbridge Construction Ltd.*, [1997] OLRB Rep. July/Aug. 751. Since neither of these decisions had been issued until after the conclusion of the hearing in this matter, we sought, received and considered the written representations of the parties regarding the relevance and applicability of the decisions to the instant case.

110. We are persuaded by the reasoning of the *Torbridge* case and by the proposition that, as a general matter, monies received by way of a no fault income replacement insurance plan (such as workers' compensation ttd benefits) ought to be deducted from any award of damages where such damages are assessed as a result of the loss of the same income replaced (in whole or in part) by the insurance scheme. To do otherwise would permit an applicant to recover for the same loss twice. Of course, to the extent that an income replacement mechanism does not provide full recovery, some damages might still be available. As in the *Torbridge* case, we are not persuaded that, for the purposes of this issue, there ought to be any meaningful distinction between damages awarded by way of a wrongful dismissal action and those which result from a finding that a discharge has been a violation of the *Labour Relations Act, 1995*. Further, neither does the fact that the instant application is one in which the union has violated its duty of fair referral (as opposed to one where an employee has been unlawfully discharged) alter our analysis. While the nature of the violation is obviously different from an unlawful discharge, the measure of damages is clearly equivalent. Nothing demonstrates that more graphically than the parties' common approach to the starting point for an assessment of damages in this case - it begins with determining the average earnings of union members as a vehicle for quantifying the applicants' loss. Obviously, while the nature of the improper conduct and the role of the offending party are different, the applicants' loss in this case (like those in wrongful dismissal cases or other unfair labour practices) is a loss of income from employment. And finally in relation to this issue, we are not troubled by the apparent difference in treatment as between workers' compensation benefits and unemployment insurance. In theory, both types of benefits ought to be deducted from damage awards. In fact, they are. It is only the mechanism which differs as a result of specific statutory provisions in the case of unemployment insurance. In the end both types of successful applicants will see their damages, at least effectively, reduced; in the one case because the actual amount of any award will be reduced, in the other because the applicant will be under a positive legal duty to repay the benefits "replaced" by the damage award.

111. We are thus satisfied that whatever damages Mr. Smith might otherwise be entitled to in respect of the period during which he was in receipt of ttd benefits, ought to be reduced by an amount equal to the benefits received. (We should also note in this regard that a proper computation of the appropriate deduction could require consideration of the parties' agreement that ttd benefits are not taxable. Such benefits might, consequently, have to be "grossed up" - in other words one dollar of ttd benefits might result in \$1.10 or \$1.25 (depending on the individual's marginal tax rate) being deducted from the damages which would otherwise awarded.) Despite our general conclusion regarding the deduction of ttd benefits, this is perhaps not the most significant obstacle to Mr. Smith's ability to claim damages for the period during which he was in receipt of such benefits.

112. Our review of the evidence regarding Mr. Smith's WCB status, his actual physical limitations, and the "system" (though we doubt it can be dignified by that appellation) the union has, or at least had, in place regarding the placement or accommodation of injured members returns us to many of the sentiments expressed in the phase one decision. Despite days and days of evidence, very little of it bearing directly on these issues, we are left with little overriding confidence in our ability to describe

the relevant facts with anything approaching precision. We are of course required, however, to make our findings on the basis of the evidence that was placed before us.

113. Mr. Smith's limitations appear to have been described in WCB documents (we were provided with no other medical evidence) fairly consistently as a partial disability precluding any lifting in excess of 10 kilograms or any repetitive gripping, squeezing or strenuous use of hands. And while we were provided with little in the form of analytical tools to marry Mr. Smith's restrictions with the general requirements of the trade, it is evident that the WCB personnel attached to the file held little hope that Mr. Smith, so long as his disability persisted, would be able to return to the ironworker trade. Mr. Smith clearly did not share that view. The WCB documents disclose something of an ongoing struggle between Mr. Smith and his counsellors, the latter encouraging him to consider and set alternate career goals.

114. Mr. Smith made much in argument of his assertion that the union resisted efforts to assist him to find modified work suitable to his restrictions. But while there may well be a grain of truth to the assertion, it is also abundantly clear to us that Mr. Smith did little to insure that the union was aware of his desire to secure such opportunities. Mr. Smith points to continuing efforts made on his behalf by WCB personnel to contact the union hiring hall in search of suitable positions. It is true that the WCB documents suggest that there was a discussion between Mr. Smith's vocational rehabilitation counsellor and Ms. Seguin, the secretary at the union's hiring hall. At the risk of relying too heavily on a conversation about which no party provided any direct evidence, it appears that this conversation is the locus of all of Mr. Smith's assertions about the union's lack of cooperation. For while there are numerous references in the WCB material to communication between the WCB and the hiring hall, these appear to either be references to the one actual conversation which took place in April of 1990 or to the possibility of future interventions (none of which appear to have materialized). In any event, Ms. Seguin appears to have made it clear that the kinds of opportunities Mr. Smith may have thought feasible e.g. assignments as a foreman or other light duty positions are ones which only very rarely become available through the hiring hall. That evidence was echoed by other witnesses and there were few, if any, examples highlighted to us where members were referred to foremen or general foreman positions through the hiring hall (many companies would have permanent or long term employees filling such roles or, alternatively, could be expected to exercise their right to request the specific member they wished assigned to such a critical position).

115. We heard some limited evidence from Mr. Zuchet in the first phase of the proceedings about the manner in which members on WCB are dealt with insofar as their continuing status on the list or their ability to retain their relative position. The manner of dealing with those members was described at paragraph 129 of the phase I decision as follows:

... The system, to the extent one can be discerned, simply involves an injured member retaining his position on the list. Where an injury may persist for a lengthy period the dispatcher may, in what was presented as nothing more than pursuing the economy resulting from not having to copy a name from list to successive Out-of-Work list, physically delete that name from the Out-of-Work list. Once the member is ready to be referred to work, he would resume his former position on the list. This is really a variation of the rule which provides a member with an unlimited right to refuse referrals without any negative impact on his placement on the list.

116. Little significant evidence was provided in the subsequent phase of the hearing to furnish us with any more profound understanding of the "system". Perhaps of greater concern is the fact that neither were we provided with much clear evidence on exactly how, when or why Mr. Smith's removal and subsequent return to the list was effected. The parties provided competing theories.

117. From the commencement of the period under review (January 1, 1990) Mr. Smith's name simply does not appear on the Out-of-Work list until March 19, 1991. It is perhaps not Mr. Smith's

absence from the list which is difficult to explain so much as the timing of his return to that list. As Mr. Smith's WCB status was of considerable duration, it is perhaps consistent with Mr. Zucchet's account that, at some time prior to January 1, 1990, Mr. Smith's name was simply removed from the list. What occasioned his return to the list? We have no direct evidence describing the actual return. The union suggests that Mr. Smith must have, at some time around March 19, 1991, advised the union that he was ready to return to work and to resume his position on the list. Mr. Smith offers a different explanation - he suggests that it was the filing, in February, 1991, of the instant complaint impugning the integrity of the hiring hall system which caused the union, as a defensive measure in response, to return Mr. Smith to the list.

118. We prefer the union's theory. As we have already indicated Mr. Smith's ttd benefits were "finalled" as of April 18, 1991. From that point he was in receipt of a 15% partial disability pension. The WCB records disclose, however, that the recommendation for the pension status was actually made on March 19, 1991. Thus it appears that Mr. Smith's return to the list is virtually simultaneous with the WCB determination to terminate the ttd benefits and to institute the partial disability pension. The timing of these events persuade us that it was Mr. Smith, in response to the imminent change to his WCB benefits including the termination of his ttd status, who communicated with the union to effect the return of his name to its former position on the Out-of-Work list.

119. We also cannot help but observe that we heard little evidence (and certainly none was highlighted to us in argument) that during the period Mr. Smith was in receipt of ttd benefits he had any ongoing contact with the hiring hall for the purpose of inquiring as to why he was receiving (virtually) no calls about work. The applicants and Mr. Smith have demonstrated their persistent abilities to agitate for what they view as their legitimate entitlements. They exhibited little hesitation, even in the face of strong political opposition, in pursuing their grievances about the administration of the union and the hiring hall. In view of that we find it likely that if, while receiving ttd benefits, Mr. Smith felt he was capable of working and that suitable work was available for him in the trade, he would have communicated that clearly, effectively and consistently to the union.

120. In view of all of the preceding, we are satisfied that Mr. Smith understood that there was little, if any, work available to him within the trade that would have been suitable to his limitations. We are equally persuaded that he had no real expectation that the hall would be able to provide such work. Finally, we are satisfied that there was no reasonable objective basis upon which any such expectation could have been based.

121. Essentially we are satisfied that, while in receipt of ttd benefits, Mr. Smith was disabled to the extent that even had the hiring hall system been operating properly, he would have found precious little in the way of appropriate work opportunities. In other words, the primary cause of Mr. Smith's loss of employment income was his disability and not any pathologies associated with the operation of the hiring hall. Even if we were wrong in this conclusion, we are also satisfied that whatever earnings might have been available through the limited work opportunities which might or could have been provided would pale in comparison to the amounts received by way of ttd benefits. In other words (and even assuming such earnings would not simply have served to reduce Mr. Smith's ttd benefits), since the putative lost earnings would have been less than the ttd benefits actually received, the measure of damages would, at best, have been negligible.

122. We are thus satisfied that Mr. Smith ought not to be entitled to succeed in his claim for damages in respect of any of the portion of time during which he was in receipt of ttd benefits.

123. Perhaps the most difficult exercise in this phase of the proceedings pertains to the quantification of damages. In the peculiar circumstances of the case this question also includes an assessment of

the applicants' duty to mitigate their loss. Indeed, the trade union has argued, in one fashion or another, that the applicants, despite the union's unlawful operation of the hiring hall, have suffered no appreciable economic loss or, in the alternative, had it within their own power to avoid any such loss by simply accepting the work opportunities that were afforded them.

124. We begin our analysis of this branch of the case by returning to our earlier discussion of the "Portiss formula". In attempting to quantify damages for lost work referrals resulting from the improper operation of the hiring hall, we find it necessary, for reasons which we now address, to resist the initially attractive approach which can be easily described as follows. If the Board can determine that an aggrieved member ought to have been referred to a particular job, then perhaps damages can be readily quantified by simply tabulating the earnings of the member who did receive the referral. One might even be tempted to look at that member's earnings for subsequent referrals on the theory that it represents the employment trajectory which the aggrieved member would/ought to have followed. In rejecting this approach, the Board, in the *Portiss* decision offered the following at paragraph 13:

The Board has equal concern with the alternative approaches advanced by the union. To compare Mr. Portiss to other members on a selective basis leaves much uncertainty. Determining the amount that an employee would have earned but for the wrongful application of fair hiring hall rules, is a speculative exercise at best. It cannot be said with any certainty that the complainant would have necessarily followed the pattern of employment for the entire year of any particular member referred ahead of him. Nor can there be any precise determination of whether he was in fact better off because a later referral might, for example, have brought him a longer assignment of a job with more overtime. When variables such as job shutdowns because of weather or loss of time due to accidents, illness, an employee's decision to quit and the time elapsed before he re-enters the hiring hall list are taken into account, it becomes virtually impossible to trace with any certainty the road not taken. In these circumstances we see little reliability in any formula for compensation that attempts to put the complainant in the shoes of any selected individual or group of members.

125. While we have already adopted the "Portiss formula" which emerged from the view of the Board as expressed above, we are compelled to return to some first principles in view of some of the union's arguments in this case.

126. The union asserts, as a general proposition, that the complainants were under a duty to mitigate their losses. It did not argue that any such obligation would have required the complainants to either work outside of the ironworkers trade or to work in a non-union setting. In other words, the union asserts that the applicants' duty to mitigate could have been entirely satisfied by their acceptance of the work opportunities that were provided to them through the hiring hall.

127. In support of its position, the union, through Mr. Michaluk, prepared documents it described as "mitigation charts". It was agreed that, although filed as exhibits, these were derivative documents and did not constitute independent proof of their contents. In large measure, however, the source documents which provided the basis for the compilation of the mitigation charts, were or had already been marked as exhibits in the proceedings. These included a number of types of records already described in our earlier decision; chief among them were the refusal book, the order books and the field dues assessment sheets.

128. The mitigation charts list the referrals accepted and consequent number of hours worked by each of the complainants. Also tabulated are the referrals which the union claims were offered to but refused by the applicants. This category of "refusals" is not limited to situations where one of the applicants explicitly refused a referral proffered by the hiring hall. It also includes instances where, for example, the union, despite some effort (usually in the form of a telephone call), was unable to actually contact the applicant(s) prior to the referral being offered to and accepted by another member. There is considerable dispute between the parties, at least with respect to some of these, about the specific

characteristics of certain refusals. Indeed, there are a significant number of instances where the complainants deny any knowledge at all about certain entries in the refusal book.

129. The charts tabulate not only the hours actually worked by the applicants, but also the hours worked by other members as a result of accepting referrals the union asserts were first made available to the applicants. With the exception of Mr. Ouellette during the 1990 calendar year, these charts suggest, and the union asserts it is the case, that had the applicants accepted all (or even a significant majority) of the work opportunities made available to them through the hiring hall, their earnings would have matched or exceeded those of the average member for the relevant periods.

130. The union submits that the argument just described is not inconsistent with the “Portiss formula” or with the Board’s reluctance (for the reasons set out in the previous citation), in cases of this sort, to try to put the complainants in the shoes of others in order to identify and quantify the “road not taken”. We disagree. It is true that the union urges this approach on us in an effort, not to quantify damages *per se* but rather, to quantify the applicant’s “failure” to mitigate their losses. Whether the nuances of difference between the two are subtle, we can point to one glaring example which highlights a similar type of inherent limitation associated with the approach suggested.

131. It is not disputed that Charles Wilburn worked for American Bridge in September of 1988. According to the charts prepared by the union, Mr. Wilburn quit the job shortly after commencing it and was replaced by Dan Fox (these facts are disputed and we have serious doubts about the accuracy of the union’s claim, but for the present purposes we will accept the facts as alleged by the union). The union then goes on in its charts to tabulate hours worked by Mr. Fox for American Bridge in 1990 as well as the hours he worked for McCrindle Steel in 1991 when the latter employer reassembled the crew that had earlier worked for American Bridge on a related job. These hours are considerable. In fact, when totalled over the period in question they are very close to the total average hours earned by members of the union. The union asks us to deduct an amount equal to the wages associated with these hours from any damages owing to Mr. Wilburn. And while the results may not always be as dramatic, the union asks us to perform the same analysis in each instance which the union refers to as a “refusal”. In each case an amount equal to the wages earned by the member who did accept the referral is to be deducted from any damages awarded to the applicant(s) who “refused” the referral in question.

132. What is the effect of such an approach? The answer in the undoubtedly extreme example of Mr. Wilburn and American Bridge is that the union is, effectively, relieved of any liability resulting from its unlawful conduct in 1990 and 1991 by virtue of Mr. Wilburn’s decision to resign from a job in 1988. To place only a slightly more dramatic gloss on it, the union effectively asks that it be excused from its hiring hall obligations (or at least its liabilities) vis a vis Mr. Wilburn for 1990 and 1991 on the basis of the fact that Mr. Wilburn quit a job in 1988. In our view this is but another graphic illustration of the inherent shortcomings invariably associated with trying to identify the “road not taken”. Just as the Board has been reluctant to allow complainants to point to a particular fellow member and to claim the equivalent of their earnings, so too must we view with some skepticism the union’s efforts in this case to write the script of events which might have been. Quite apart from the apparent inappropriateness of effectively excusing the union from its statutory obligation, the approach simply contributes too much of a lottery texture to the exercise of quantifying damages. Union members ought not to be made to feel that decisions to turn down or quit a job will “disentitle” them from reliance on the hiring hall for a period equivalent to that which the job may last (be it a day or two years).

133. This is not to say, however, that we have concluded that the applicants’ propensities to refuse job referrals are not relevant to their claim for damages. As indicated in our earlier decision, union members are not required (by any of the hiring hall rules) to accept any particular referrals offered to them. Indeed, unlike systems which may exist elsewhere, a member’s position on the out of

work list is unaffected by his refusal of a referral. We have also earlier described how after a referral to a short-term job (less than seven consecutive working days), a member is entitled to resume their former position on the out of work list. However, once a member's referral results in seven consecutive days of work, any subsequent return to the out of work list (whether after seven days or two years of work) will be to the bottom of that list. Thus, while we have eschewed any lottery model for quantification of damages, it is clear that there can be a lottery element to the manner in which members might approach referrals offered by the hiring hall.

134. From the point of view of placement on the out of work list, a member who pays attention to such things will wish to avoid the "short long term job" - i.e. short enough to provide little income but long enough to move the member to the bottom of the referral list. Such a member may opt to refuse a shorter term job in the hope of capitalizing on his preferred position on the list to secure a referral to a more desirable and/or longer term job. The risks associated with such a strategy are apparent. Other members may simply choose not to concern themselves with "playing the angles" of the hiring hall system. In an approach which may be aimed at maximizing income with less concern about the nature of specific referrals or their duration, they may opt to simply accept virtually every referral which comes their way. These choices are ones that individual members are free to make. Assuming, however, that the hiring hall is otherwise operating lawfully, it is not apparent to the Board that the union ought to be responsible for the risks that individual members subject themselves to in the attitudes and strategies they may adopt in relation to the hiring hall.

135. This point was graphically illustrated in one of the more significant moments of testimony in the case. In a series of questions put to him during his cross-examination, Mr. Wilburn, one of the few (and perhaps the only) witness who impressed the Board with his consistently forthright and candid approach to giving evidence, acknowledged some of the difficulties associated with the applicants' claims or at least their theory of recovery. Although the exchange began in reference to a specific referral he had declined, it became clear that Mr. Wilburn had some difficulty in refuting at least the potential or theoretical inequity which could result were the Board to award damages in respect of a given day when the applicant had explicitly declined the opportunity to work on that day. In general terms, we accept the union's submission that there is an unfairness associated with requiring the union to pay a member for deciding to stay at home when a specific work opportunity was made available to and was declined by that member.

136. Where does all this leave us in our efforts to quantify damages? We have determined that we ought, in relation to each of the applicants, to establish a factor or percentage by which their damages ought to be reduced. In determining this factor, we have taken into account a number of common (and sometimes conflicting) considerations as well as others which are specific to individual complainants.

137. Among the common factors are the following. The mitigation charts undoubtedly suggest that significant numbers of work opportunities were declined by each of the applicants. We must, however, be cautious in the extent of reliance we place on the mitigation charts and the supporting documents upon which they are based (such as the refusal book). We note again that the union's definition of refusals included not only explicit refusals by the applicants but also situations where the union was unsuccessful in contacting them. Further, we were not presented with the tools and analysis which would be necessary to determine with any precision, how the the applicants' "rate of refusal" might compare with that of their fellow members (or more specifically, and in a context where a refusal has no impact on one's placement of the out-of-work list, how that "rate of refusal" might compare to that of the "average" member whose earnings are the starting point for the quantification of damages). Furthermore, the documents in question suffer from the very same limitations already described in relation to the union's record keeping. There was little direct evidence from the union in relation to

many of the “refusals” and information in the refusal book was often the subject of challenge by the applicants. That is not to say, however, that we uniformly preferred or accepted the evidence of the applicants in all cases of conflict. There were, however, significant numbers of cases where the fact of a “refusal” was not disputed by the applicants although the precise circumstances or reasons for it may have been. We have also considered the fact that, as a general rule, little information was provided to the applicants about the likely duration of jobs being offered (although we accept the union’s submissions that in many cases such information may simply not be available). In that context, we have also considered the fact that while some of the refusals were in relation to longer term jobs (indeed, in some cases to *the very jobs* identified by the parties in Phase I as *the jobs* in question), a very significant number of the refusals pertained to short or “short-long” term jobs.

138. In addition to these common factors, we have also considered aspects of the individual complainants’ circumstances and approaches to referrals offered to them. It is clear to us that they each exhibited distinct patterns of selectivity in responding to referrals offered to them by the union. In Mr. Wilburn’s case, there were instances where his lack of access to a car was relied upon to explain turning down a job and others where he appears to have entered into a delicate dance with Mr. Zucchet around welding qualifications. There also appears to have been more than one occasion upon which he declined referrals to the very jobs that were the subject of the Phase I decision. He exhibited other preferences related to what he understood the precise nature of the job (or employer) being offered. Having considered all of the evidence and, in particular, the nature and extent of Mr. Wilburn’s personal propensity to decline referrals, we are persuaded that he could not realistically have expected to earn more than 65% of the wages earned by the average member even had the hiring hall been functioning properly. In other words his claim for damages ought to be reduced by 35%.

139. Mr. Ouellette exhibited similar kinds of preferences as well as others which are considerably less sympathetic in nature. For example, it was acknowledged that it “might be fair to say” that the *only* jobs he had accepted during 1990 and 1991 were those at automobile plants. Perhaps the most impressive part of his evidence regarding his personal selection criteria related to the information he would expect to receive from Mr. Zucchet. Mr. Ouellette was quite emphatic that unless Mr. Zucchet provided him with certain information at the time of the referral - including the “job description” and the duration of the job - he was “going to refuse every time”. Mr. Ouellette then explained that he had “rights” in his position at the top of the out of work list.

140. Returning to a theme which has surfaced frequently during this case, it is not clear to us that, for present purposes, Mr. Ouellette’s “rights”, as he describes them, are significantly different depending on whether he is at the top or bottom of the out of work list. He has the right under the hiring hall rules to refuse a referral; his placement on the list will not be affected. He has the right under the hiring hall rules to refuse each and every referral; his placement on the list will not be affected. But while Mr. Ouellette may be entitled to attempt to exploit his position on the list by turning down referrals until he receives all of the particulars he seemed to require of Mr. Zucchet so as to land the “perfect” job, he should not be surprised if the adoption of such a strategy results in a diminution of his employment income. Indeed, it appears to us that, quite apart from any pathologies associated with the operation of the hiring hall, Mr. Ouellette’s approach and attitude have served to significantly reduce his employment opportunities. Our approach might have been different had we been persuaded by the applicants’ general claim that they were deliberately being offered only the less desirable and shorter term jobs. The evidence and argument mustered on this point falls short of persuading us that any systematic and deliberate conspiracy was in play. Indeed, as we have mentioned before, we are persuaded that the dispatcher would frequently simply not know the expected duration of a job being offered to a member. The evidence also disclosed that Mr. Ouellette refused long as well as short term jobs (including referrals to two of the very jobs which were the subject of the Phase I decision). While he was and is entitled to adopt and maintain his attitude toward referrals, Mr. Ouellette should

understand he can have no reasonable expectation of earning a level of wages equivalent to that of the average member.

141. Having considered all of the evidence and, in particular, the extreme and dramatic nature and extent of Mr. Ouellette's personal propensity to decline referrals, we are persuaded that he could not realistically have expected to earn more than 50% of the wages earned by the average member even had the hiring hall been functioning properly. In other words his claim for damages ought to be reduced by 50%.

142. Our assessment in relation to Mr. Smith is slightly more problematic. First of all, in view of our earlier conclusions regarding the effect of his receipt of ttd benefits up to April 18, 1991, Mr. Smith's claim for damages can only be asserted for the period April 18, 1991 to November 18, 1991. We should note that although there was a significant change in Mr. Smith's WCB status after April 18, 1991, it was never made clear to us that there was any significant alteration to his physical capacity or the extent of his disability. Presumably in view of his change in WCB status and, in particular, the end of his classification under that scheme as "totally disabled", the union did not take the position that Mr. Smith was physically unable to work after April 18, 1991 and therefore suffered no loss as result of the union's improper operation of the hiring hall. There can be no doubt, however, that Mr. Smith's physical limitations continued to reduce his reasonable employment expectations, but the precise extent of that impact is difficult to measure. In the peculiar and specific circumstances of the *D'Alessandro* case (supra at paragraph 87), the Board translated a 10% partial disability benefit into a conclusion that the employee in question (a labourer) would likely not have earned more than 30% of the earnings of the average labourer. One might be tempted to suggest that Mr. Smith's expectations might be even lower given that his disability has been rated at 15% rather than 10%. The facts, however, do not support such a conclusion. During the period April 18, 1991 to November 18, 1991, the average member would have worked approximately 600 hours (our calculations will be set out in a little more detail below); Mr. Smith worked 218 hours.

143. Thus, for the period in question and despite his disability and the improper operation of the hiring hall, Mr. Smith did manage to work over 35% of the hours worked by the average ironworker member. We are satisfied that had the hiring hall been functioning properly, Mr. Smith would have had a realistic expectation of securing more referrals than he did. At the same time, however, we are also persuaded that his continuing physical limitations would have reduced the breadth of jobs he could accept. Indeed, it is quite clear that there were some referrals offered to Mr. Smith (including at least one to Niagara Riggers) which he felt constrained to decline as a result of his physical limitations. Despite this, however, we cannot ignore the fact that even when compared to his co-applicants, it emerges that Mr. Smith worked almost as many hours in the 7-month period from April to November, 1991 as either of the other two complainants did in the entire period (almost two years) under review. As with many facts in this case, this is capable of competing explanations. On the one hand, it may suggest that the other two applicants suffered greater losses as a result of the unlawful operation of the hiring hall. Alternatively, it suggests that Mr. Smith's propensity to refuse work opportunities, notwithstanding his physical limitations, was not as dramatic as his colleagues. For the purposes of establishing a percentage by which to reduce damages, we prefer the latter explanation.

144. Having considered all of these factors we are persuaded that Mr. Smith's claim for damages ought to be reduced by factor of 25%.

145. We now proceed to an assessment of the precise amounts owing to each of the complainants by way of damages calculated in accordance with the foregoing.

146. We have already indicated that the union's members worked an average total of 1052 hours in 1990 and 1025 hours in 1991. We have thus calculated that over the period in question the typical

member would have worked an average of 20 hours per week. The period we are concerned with (January 1, 1990 to November 18, 1991) consists of 98 weeks, a period which would therefore correspond to 1960 hours.

147. We begin with Mr. Wilburn. We have already indicated that his claim is to be reduced by a factor of 35%; thus the claim for 1960 lost hours is reduced to a claim for 1274 hours. Mr. Wilburn actually worked a total of 237 hours (205 hours in 1990 and 32 in 1991) in the period. That further reduces his claim to 1037 hours. Up until May 1, 1991 the hourly rate under the collective agreement (wages and vacation & holiday pay) was \$24.58; the agreement also contemplated a further hourly payment of \$3.47 as pension. As of May 1, 1991 the corresponding amounts were \$25.97 and \$3.80. We shall therefore assess Mr. Wilburn's hourly rate in proportion to the amount of time each rate was in force. The "1990 rate" (i.e. the one in place until May 1, 1991) was in place for approximately 70 of the 98 weeks in question (or approximately 70%). We shall therefore assess 726 (i.e. 70% of the 1,037 hours) owing at the 1990 rate. Accordingly Mr. Wilburn is to be compensated as follows:

(a) Wages

726 hours (@ 1990 rate) x \$24.58 =	\$17,845.08
311 hours (@ 1991 rate) x \$25.97 =	\$ 8,076.67
TOTAL WAGES	\$25,921.75

(b) Pension contribution:

726 hours @ \$3.47	\$ 2,519.22
311 hours @ \$3.80	\$ 1,181.80
TOTAL PENSION	\$ 3,701.02

148. Mr. Ouellette's calculation proceeds as follows. During the 98 week period in question Mr. Ouellette, as set out above, was not in good standing and therefore not eligible to claim referrals for a total of 21 weeks bringing that total down to 77 weeks. We have also determined that his claim ought to be reduced by a factor of 50% thereby further bringing the claim down to 38.5 weeks or 770 hours. During the period in question, Mr. Ouellette actually worked for a total of 283.5 hours, bringing his claim to its final total of 486.5 hours. We shall treat these hours in the same 70/30 proportion for the purpose of applying the hourly rate. Thus Mr. Ouellette is to be compensated as follows:

(a) Wages

340.5 hours (@ 1990 rate) x \$24.58 =	\$ 8,369.49
146 hours (@ 1991 rate) x \$25.97 =	\$ 3,791.62
TOTAL WAGES	\$12,161.01

(b) Pension contribution:

340.5 hours @ \$3.47	\$ 1,181.53
146 hours @ \$3.80	\$ 554.80
TOTAL PENSION	\$ 1,736.33

149. Mr. Smith's claim for damages can be made only in relation to the period April 18, 1991 to November 18, 1991, a total of 30 weeks or 600 hours. We have determined that Mr. Smith's claim ought to be reduced by a factor of 25% thus reducing the claim to 450 hours. Mr. Smith actually worked for 218 hours during the period reducing the total amount of damages to 232 hours. Since all but a few

of the days in Mr. Smith's period were days on which the 1991 rates were in place, we shall use those as the basis for our calculation.

Wages: 232 hours @ \$25.97 = \$ 6,025.04
Pension: 232 hours @ \$ 3.80 = \$ 881.60

150. The union is hereby directed to pay to each of the applicants the amounts set out above plus interest. Interest on the amounts owing is to be calculated at the prevailing relevant Bank of Canada rate calculated and compounded annually as at December 31st of each year commencing with 1992 and continuing until 1998 (prorated for the 1998 year to the date of this decision).

151. Unless the union and the individual applicant concerned agree otherwise, the above amounts (plus the interest thereon) identified as pension contribution are to be paid by the union to the Ironworkers Ontario Pension Fund on behalf of and for the credit and benefit of the individual applicants in the amounts set out above.

152. Although we have considered all of the arguments and submissions of the parties, we have not set them all out in intricate detail. To the extent we have not explicitly granted any of the other requests for relief advanced by the applicants, those requests may be considered to have been rejected by this Board. While not necessarily exhausting the list, those requests included submissions that damages include a 25% wage bonus for foreman's work, that the Board award costs and that the Board grant its consent to the prosecution of the responding party trade union. Although each of these claims are distinct, we are of the view that they do share the common characteristic of being so totally unwarranted in the circumstances of this case that they bear no further elaboration or examination.

153. With respect to any other remedial issues regarding the operation of the hiring hall, while it may be difficult to envision the extreme circumstances which could warrant such extreme intervention, we note that even the applicants have not sought the interference of the Board in the actual and specific reshaping or restructuring of the hiring hall rules of operation which may have to be implemented to comply with this decision. Accordingly, we limit ourselves to our finding that, for the reasons set out in the Phase I decision, the operation of the union's hiring hall has been contrary to the requirements of section 75 of the Act. We therefore direct the union to forthwith take whatever steps are necessary to insure the the operation of the hiring hall complies with the requirements of section 75 of the Act as described in the Phase I decision.

154. The applicants did request that members of the union be provided with some form of notice of these proceedings. While there may not have been agreement on the methods for effecting that notice, the trade union did not oppose such a measure in principle.

155. We do not think it is necessary or appropriate to direct that the union provide all of its members with copies of this and the Phase I decisions. We do, however, think it would be appropriate to provide each member with a brief summary of the outcome of these proceedings in the manner described below. We also direct that the union, upon the request made by any member within 6 months of the date of this decision, furnish such member, at the union's expense, with a copy of this and/or the Phase I decision. Accordingly, we hereby direct that the union forward a copy of the attached Appendix "A" "Notice to Members of Local 700" (the "notice") to each of its members. The notice is to be forwarded to members promptly following receipt of this decision and may, if convenient for the union, be appended to the next "INFO-700" or similar union publication provided that is issued within 45 days of this decision. In addition, the union is directed to post a copy of the notice at each of its hiring hall locations. The notices are to be posted in prominent locations where they are likely to come to the

attention of union members. The notices are to remain posted for a period of 60 consecutive days. Finally, the union is directed to read a copy of the notice to all of the members in attendance at the union's next regular monthly membership meeting.

156. In summary, we have found and have declared that the union violated the Act through the threats imposed on the applicants by Mr. Marr and Mr. Poisson as described above. All other claims by the applicants that the union has violated the Act (with the exception, of course, of the violation of section 75 found in the Phase I decision) have been dismissed.

157. We have also ordered that the union pay the following amounts plus interest as described above:

- (a) To Mr. Wilburn \$25,921.75 in lost wages and \$3,701.02 in lost pension contributions.
 - (b) To Mr. Ouellette: \$12,161.01 in lost wages and \$1,736.33 in lost pension contributions.
 - (c) To Mr. Smith: \$6,025.04 in lost wages and \$881.60 in lost pension contributions.
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Appendix "A"

The Labour Relations Act, 1995

NOTICE TO MEMBERS OF IRONWORKERS LOCAL 700

Posted and distributed by order of the

Ontario Labour Relations Board

AFTER MANY DAYS OF HEARING EVIDENCE OVER A PERIOD OF YEARS THE ONTARIO LABOUR RELATIONS BOARD HAS CONCLUDED THAT ASPECTS OF THE MANNER IN WHICH LOCAL 700 OPERATED ITS HIRING HALL DURING THE YEARS 1990 AND 1991 WERE UNLAWFUL

THE UNION HAS AND WILL CONTINUE TO MAKE CHANGES, AS NECESSARY, TO INSURE THAT THE HIRING HALL IS OPERATED IN A MANNER WHICH IS NOT ARBITRARY, DISCRIMINATORY OR IN BAD FAITH

THE UNION HAS ALSO BEEN ORDERED TO PAY DAMAGES TO THE APPLICANTS IN THIS CASE TO COMPENSATE THEM FOR THE LOSSES THEY SUFFERED AS A RESULT OF THE UNLAWFUL OPERATION OF THE HIRING HALL

THE BOARD HAS ALSO FOUND THAT THE UNION VIOLATED THE LABOUR RELATIONS ACT BY THREATENING TO IMPOSE PENALTIES ON THE APPLICANTS. MORE SPECIFICALLY, THE UNION WAS FOUND TO HAVE ACTED UNLAWFULLY IN MARCH OF 1990 WHEN FRED MARR THREATENED TO HAVE THE APPLICANTS CHARGED IF THEY LOOKED INTO THE UNION'S FINANCES. SIMILARLY, THE BOARD FOUND THAT THE UNION VIOLATED THE ACT WHEN THEN PRESIDENT POISSON (IN APRIL OF 1991 AND SHORTLY AFTER THE APPLICANTS HAD FILED THEIR COMPLAINT WITH THE BOARD) GAVE THE APPLICANTS WRITTEN NOTICE THAT THEY WERE BEING CHARGED FOR UNSPECIFIED VIOLATIONS OF THE CONSTITUTION. THE BOARD CONCLUDED THAT THESE WERE BOTH EXAMPLES OF UNLAWFUL REPRISALS IMPOSED ON THE APPLICANTS FOR THE EXERCISE OF THEIR RIGHTS UNDER THE ACT

SHOULD YOU BE INTERESTED IN READING THE BOARD'S DECISION(S) IN THIS MATTER, COPIES CAN BE PROVIDED TO YOU, ON REQUEST, BY THE UNION

This is an official notice of the Board and must not be removed or defaced.

DATED this 23rd day of July, 1998.

1432-98-HS; 1436-98-HS Underwriters' Laboratories of Canada, Applicant v. Office & Professional Employees International Union, Local 520 and Ministry of Labour, Responding Party

Health and Safety - Employer asking Board to suspend order of inspector under section 61(7) of *Occupational Health and Safety Act* pending disposition of appeal - Inspector directing that a health and safety representative be selected from among the employer's employees at a particular location - Application to suspend order granted

BEFORE: *Inge M. Stamp*, Vice-Chair.

DECISION OF THE BOARD; August 12, 1998

1. This is a request by the applicant for a suspension of Order No. 001, Field Visit No. 766567 dated July 10, 1998 pending the disposition of the appeal in File No. 1432-98-HS. Order No. 001 directs a Health and Safety representative be selected from among the workers at 10 Crouse Road.

2. The Board in its decision of July 22, 1998 directed the filing of submissions by any responding party wishing to participate within 10 days.

3. The Office & Professional Employees Union Local 520 by letter of August 6, 1998 advised it agrees with the Inspector's finding "that there is a need for worker health & safety representation originating from 10 Crouse Road". The letter goes on to say Local 520 is "prepared to have one worker representative, inclusive of the three (3) appointed Health & Safety Committee members, focusing on 10 Crouse Road".

4. By fax dated August 11, 1998 the Ministry replied stating:

The Ministry of Labour has not received the Applicant's suspension grounds and therefore requests that the suspension request be denied.

Adjudicator Lee Shouldice's decision dated July 22, 1998 required such ground to be provided to the parties by July 29, 1998.

This appears to be the first response received by the Board from the Ministry following the July 22, 1998 decision.

5. The applicant faxed the Registrar on August 12, 1998 with copies to the Ministry as follows:

This is in response to a letter addressed to you from Line Forestier of the Ministry of Labour, dated August 11, 1998, informing you that they have not received ULC's grounds for suspension.

The grounds for suspension were outlined in ULC's original appeal letter to you dated July 14, 1998 and stated again in a second letter dated July 29, 1998.

As requested in Lee Shouldice's decision dated July 22, 1998, a copy of these two letters were faxed to the other parties on July 29, 1998 and, at the same time, a copy was mailed to them. A copy of the fax transaction report is attached which will confirm that the letters were transmitted to the following fax numbers on July 29, 1998 with acceptable results:

Andrea Esson, Ministry of Labour, (416)326-7985

Anna Ballon, Ministry of Labour, (416)314-5405

A copy of the letters were also sent to Sandy Leva of ULC, who is the Health and Safety member representing the workers and is a member of the Office & Professional Employees International Union, Local 520.

Underwriters' Laboratories of Canada has not received a response from any of the responding parties and therefore requests that Order #001 be suspended pending the disposition of the appeal.

Adjudicator Lee Shouldice's decision dated July 22, 1998 required a response by the responding parties by August 6, 1998.

6. The Ministry's response of August 11, 1998 is neither timely nor helpful. It does not address any of the issues raised in the original appeal of July 14, 1998 which presumably was received by the Ministry.

7. Local 520 of the OPEIU does not take any position with respect to the suspension request.

8. Order No. 001, F.V. #766567 came about as the result of a routine inspection. There is an existing joint Health & Safety Committee comprised of 3 worker representatives and 3 management representatives. There are monthly inspections by the existing joint Health & Safety Committee of all five testing and administration buildings including 10 Crouse Road. The applicant submits a separate representative would be a duplication of effort and a burden to its resources. The applicant further submits the suspension of this order does not endanger worker safety.

9. Having considered the submissions of the parties, Order No. 001, F.V. #766567 is suspended pending the disposition of the appeal in Board File No. 1432-98-HS.

0756-98-PS Upper Canada District School Board, Applicant v. Canadian Union of Public Employees and its Local 5678; United Brotherhood of Carpenters and Joiners of America, Local 1988; Central Office Association - The Leeds and Grenville County Board of Education; Ontario Secondary School Teachers' Federation, District 42; Ontario Secondary School Teachers' Federation, District 37; Ontario Secondary School Teachers' Federation, District 38; Office and Professional Employees International Union, Local 483, Responding Parties

Public Sector Labour Relations Transition Act - Parties agreeing that there should be a bargaining unit of professional student services personnel employed by District School Board, but disputing whether there should be one or three additional bargaining units - Board not accepting submission that it should apply a standard four-bargaining unit bargaining structure across the educational sector - Board determining that one additional bargaining unit appropriate

BEFORE: *Robert Herman*, Alternate Chair.

APPEARANCES: *Margaret Szilassy, Ronald Prescott, Robert Whitaker, Joseph McKewn and Anne Craig* for the applicant; *Julia McNally and Pierre Cote* for OSSTF; *Risa Pancer, Andre Lamoureux and H. Collette* for CUPE; *Sean Fitzpatrick, Christopher Wilson, Karen Wattie and Paul D. Scrimshaw* for OPEIU; no one appearing on behalf of the United Brotherhood of Carpenters and Joiners of America.

DECISION OF THE BOARD; August 10, 1998

1. This is an application under the *Public Sector Labour Relations Transition Act, 1997* (the "Act").
2. At the consultation, all the parties present agreed that one of the bargaining units should be a bargaining unit of professional student services personnel ("PSSP"). Further, all the parties present either agreed that there should be no separate bargaining unit of carpenters and carpenters apprentices, or alternatively, took no position with respect to this issue. The Board notes that the United Brotherhood of Carpenters and Joiners of America, Local 1988 did not file any material facts, though directed to do so by Board decision of June 23, 1998, nor did anyone appear on its behalf at the consultation.
3. The Board orally ruled that there would be a bargaining unit of PSSP, but that there would be no separate bargaining unit for carpenters and carpenters apprentices.
4. The parties remained in dispute with respect to whether there should be only one additional bargaining unit, as well as the PSSP bargaining unit, or whether there should be three other bargaining units. The employer, OSSTF, and CUPE all took the position that only one additional bargaining unit was appropriate, generally described as an "all employee" unit, including custodial, maintenance, office, clerical and technical, basic education, and educational assistants. OPEIU asserted that this Board has been finding that four bargaining units are appropriate in the educational sector: an office, clerical, and technical unit, including educational assistants, a custodial and maintenance unit, a unit of continuing education and other instructors, and a PSSP unit. OPEIU submitted that the same configuration was appropriate here.
5. After hearing the submissions of the parties, the Board ruled orally as follows:
 1. The question for the Board to determine is whether, in addition to a PSSP bargaining unit, there should be only one other bargaining unit, generally described as an all employee bargaining unit, or three other bargaining units, one of instructors (including continuing education instructors), one of maintenance and custodial employees, and one of office, clerical, and technical employees, and educational assistants.
 2. The employer, OSSTF, and CUPE all take the position there should be one "all employee" bargaining unit, while OPEIU takes the position that there should be the three bargaining units just described.
 3. Both positions are reasonable and both describe rational bargaining unit structures. Additionally, one cannot help but be sympathetic to the spectre of restructuring eliminating bargaining rights held by particular bargaining agents. Nevertheless, this is the purpose and the effect of Bill 136.
 4. In part, the question for the Board involves consideration of whether to apply a standard bargaining unit structure across the educational sector, which can be described as essentially four standard or generic bargaining units: one bargaining unit of PSSP, one of continuing education and other instructors, one of office, clerical and technical employees, and one of custodial and maintenance employees. Alternatively, should the Board assess each application and each school board on an individual basis, and determine the bargaining unit structure appropriate to the particular successor employer?
 5. In balance, I believe that the latter approach is the appropriate one. I do not agree that the Ontario Labour Relations Board has adopted an approach in Bill 136 applications arising in the educational sector of generally applying the four described standard bargaining units, although I recognize it has done so in a number of applications. In my view, each application depends on the particular facts and circumstances.
 6. Here, there are good reasons to find and determine that one "all employee" bargaining unit (in addition to the PSSP unit) is more appropriate.

7. First, most of the participants or players (but not all of them) favour the one "all employee" bargaining unit, including the successor employer, and the unions representing approximately 700 of the 900 employees in question. While one remains aware of some of the potential factors that might motivate parties to take particular strategic positions, the agreement of these parties nevertheless remains a meaningful factor.

8. Second, one bargaining unit of "all employees" is neither unwieldy nor is it unduly large.

9. Third, at the predecessor Boards of Education disparate groups had a history of being included in one bargaining unit, and the lines between classifications were blurred within particular bargaining units. Given the varied and multiple classifications within one bargaining unit, it is worth noting that there is no evidence of any labour relations problems in any of the predecessors Boards arising from these groupings.

10. Indeed, in some of the collective agreements containing varied classifications, the parties themselves established separate seniority lists and separate classifications or groupings. Although OPEIU pointed to this as a factor mitigating against the combination of classifications in certain bargaining units, this factor is equally supportive of a larger bargaining unit, because it appears on the evidence that the bargaining unit structure itself has not prevented the parties from achieving workable solutions, and from bargaining in a manner that remains sensitive to variations and differences.

11. Fourth, the four bargaining units requested by OPEIU would require subdivisions within groupings in existing bargaining units. The Board has some concern about doing this, absent compelling reason to do so.

12. Fifth, the four bargaining units sought by OPEIU would for the most part represent an increase in the bargaining units that the employer would have to deal with, in so far as three of the predecessor Boards had less than four bargaining units. In some circumstances this may be appropriate, but it does not appear to be so here.

13. For all these reasons, the Board determines that there should be two bargaining units, one of PSSP and one "all employee" bargaining unit.

6. After providing this decision, the parties were able to resolve the matters remaining in dispute and filed Minutes of Settlement, which read as follows:

Minutes of Settlement

Pursuant to the Board's August 5, 1998 oral decision, the parties agree to the following:

1) PSSP Bargaining Unit

The description of the bargaining unit is agreed, as set out in the attached Schedule A.

2) PSSP Bargaining Agent

the parties agree that OSSTF is the bargaining agent for the PSSP unit, unless prior to August 31, 1998, proof is provided to OSSTF and the OLRB that the OSSTF has abandoned its bargaining rights in writing with respect of its PSSP unit in Stormont, Dundas, Glengarry County Board of Education, in which case there shall be a vote with two options: OSSTF and non-union.

3) Bargaining Unit #2

The description of the bargaining unit is agreed, as set out in Schedule B, attached.

4) The Applicant will provide street addresses for each of the poll locations to the OLRB forthwith.

- 5) The Applicant will provide to the OLRB and all parties on or before August 28, 1998 a list of the names of all employees in bargaining unit #2. Such list shall include the following:

- names, home addresses, phone numbers, positions.

The list will be in alphabetical order by surname by predecessor school board.

The Applicant will make its best effort to include work location on the list.

- 6) The parties request a meeting with a Labour Relations Officer, in Ottawa, on Thursday, September 3, 1998 to agree to a voter's list.
- 7) Where possible employees will attempt to vote during non-working hours, and where not possible will be allowed time off to vote during working hours after acquiring permission from their principals, such permission will not be unreasonably denied.

Signed at Toronto this 5th day of August, 1998.

for Applicant: "R. R. Prescott"

for CUPE: "H. Collette"

for OSSTF: "Pierre Cote"

for OPEIU: "Karen Wattie"

Schedule A

PSSP BARGAINING UNIT DESCRIPTION

Professional student services personnel are all employees of the employer in the professional student services group save and except the Chief Psychologist pursuant to section 1(3)(b) of the Ontario Labour Relations Act, superintendant, persons above the rank of superintendant, plant, business and personnel staff and employees in other bargaining units for which any trade union holds bargaining rights.

Clarity Note: The PSSP group includes psychologists, psychometrist, behaviourists, social workers, speech & language pathologists, attendance counsellors, and child youth workers assigned to young offender instructional units.

Schedule B

All employees of the Upper Canada District School Board save and except Supervisors and persons above the rank of Supervisor, Teachers as defined in the *Education Act*, Human Resources personnel, Executive Assistants and secretaries to the Superintendents, the Director of Education and the Board, and professional student services personnel.

7. The parties are directed to comply in all respects with the Minutes of Settlement.
8. Further to the decision provided orally at the hearing, and having regard to the Minutes of Settlement, the Board determines that there should be a PSSP bargaining unit described as follows:

all employees of the employer in the professional student services group, save and except the Chief Psychologist pursuant to section 1(3)(b) of the Ontario Labour Relations Act, superintendant, persons above the rank of superintendant, plant, business and personnel staff and employees in other bargaining units for which any trade union holds bargaining rights.

Clarity Note:

The PSSP group includes psychologists, psychometrist, behaviourists, social workers, speech & language pathologists, attendance counsellors, and child youth workers assigned to young offender instructional units.

9. The Board further determines that there should be a second bargaining unit described as follows:

all employees of the Upper Canada District School Board save and except Supervisors and persons above the rank of Supervisor, Teachers as defined in the *Education Act*, Human Resources personnel, Executive Assistants and secretaries to the Superintendents, the Director of Education and the Board, and professional student services personnel.

10. A Board Officer is appointed to meet with the parties, in Ottawa, on September 3, 1998, to deal with all matters arising from this decision, including working out an agreement to a voters' list.

11. With respect to the "all employees" bargaining unit described above, there shall be a vote held on October 8, 1998, and there will be five candidates on the ballot, as follows:

1. CUPE/SCFP
2. Office and Professional Employees International Union (OPEIU/SIEPB)
3. Ontario Public School Teachers Federation
4. Ontario Secondary School Teachers' Federation (OSSTF/FEESO)
5. The Leeds and Grenville County Board of Education Central Office Association

12. Finally, the Upper Canada District School Board is directed to post copies of this decision in locations where it is likely to come to the attention of potential voters, and to keep this decision posted until October 9, 1998.

0560-97-R United Food and Commercial Workers Union, Local 1977, Applicant v. White Rose Crafts and Nursery Sales Limited, Responding Party

Certification - Board earlier barring UFCW under section 10(3) of the Act from re-applying for certification for one year following unsuccessful application - Nine weeks later, local of UFCW applying for certification - Following taking of representation vote, Board receiving parties' submissions regarding exercise of Board's discretion to entertain UFCW local's application - Board applying *Titan Tool and Die* case and exercising discretion under section 111(2)(k) of the Act against entertaining UFCW local's certification application - Application dismissed

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

APPEARANCES: *John R. Evans*, *Mitch Healey* and *Scott Penner* for the applicant; *John Mastoras*, *Morrie Zucker*, *Beth Burrows* and *Deirdre O'Connell* for the responding party.

DECISION OF THE BOARD; July 6, 1998

1. This is an application for certification. The employer asserts that the application is barred or that the Board should refuse to entertain the application having regard to an earlier unsuccessful application by the United Food and Commercial Workers International Union (the "International").

2. The Board recently completed 11 days of hearings into the matter. The hearings took 10 months to complete. At the conclusion of the hearings, the parties requested a bottom line decision. The Board has chosen to provide brief reasons. No further reasons will follow.

3. The application was filed on May 14, 1997. The applicant is the United Food and Commercial Workers Union, Local 1977 (the “applicant” or the “Local”). Approximately 8 or 9 weeks prior to the filing of this application, the Board dismissed an application for the same bargaining unit that had been filed by the International. The dismissal followed a vote in which the International lost by a respectable margin.

4. The campaign leading up to the present application began either two or three days after the vote was held and the results were announced in the earlier application. The two union organizers in the first application were representatives of the Local. There were no organizers from the International. One of the two organizers, the Vice President of the Local, Mitch Healey, was also the principal organizer in the second campaign. The applicant’s evidence is that its two organizers had been “seconded” to the International for purposes of the first campaign.

5. The two campaigns were contiguous if not continuous. Immediately following the first vote, one of the key inside organizers asked Mr. Healey what the employees could do. Mr. Healey said that he would look into the matter and get back to her. He did so within two days. He advised the employee that they could commence a second campaign under the aegis of his Local. He testified that he gave this information on the basis of legal advice and because he believed that the employees would simply continue their efforts at organizing with another union altogether. Accordingly, the very next day (i.e. 3 days after the first vote), Mr. Healey met with the same inside organizers, all of whom signed cards in the name of the Local, and the second campaign was underway.

6. Without reviewing the evidence in detail, the Board is satisfied that the employees would not reasonably have perceived any meaningful differences between the two applicants or between the two campaigns. The human face of the union was essentially the same in both applications and there was some considerable overlap in the identity of the union in the documentation used in each. At most, *some* employees may have been told that the Local was like a “subsidiary” of the International.

7. The parties argued this matter over the course of one and one-half days. The Board will not reproduce those arguments. Suffice it to say that the employer relied on *Titan Tool and Die Limited*, [1997] OLRB Rep. March/April 281, decried the attempt by the Local to circumvent the mandatory bar imposed on the International, and invited the Board to apply a “reasonable perception of employees” test. The employer asked the Board to dismiss the application either on the basis that the applicant was caught by the mandatory bar or through the exercise of its discretion to bar or refuse to entertain an application under section 111(2)(k). The employer requested, further, that a bar be imposed for up to one year against any additional applications by the International, its locals or, perhaps, any other trade union.

8. The applicant relied on the principle of “workplace democracy” (which is said to underlie the changes to the *Labour Relations Act* brought about by Bill 7), the fact that a vote had already been held and partially counted (the results being, as of yet, inconclusive), the assertion that it was not caught by the mandatory bar imposed against the International pursuant to section 10(3), the further assertion that the Board’s discretion to bar or refuse to entertain an application pursuant to section 111(2)(k) had been supplanted by the provisions of sections 8 and 9, and a substantial body of Board case law which, according to the applicant, gives substantial, if not decisive, weight to the existence of two separate legal entities and the signing of fresh membership evidence in the second application. The applicant suggested, with the greatest of respect, that *Titan Tool and Die Limited* could not reasonably have been intended to depart from that basic approach.

9. In *Titan Tool and Die Limited*, the Board was faced with a similar application and, while allowing the application to proceed in that case, attempted to place the exercise of its discretion on a proper footing. The Board articulated a series of factors to be considered in cases such as these (see paragraph 13 of that decision) which, the applicant appeared to acknowledge, do not cut in its favour.

10. In this case, unlike *Titan Tool and Die Limited*, the second application was filed within almost two months of the date of the dismissal of the first application and there was virtually no break in the two campaigns. Accepting the applicant's evidence at face value, the application was also filed solely in anticipation of the possibility that employees *might* wish to go elsewhere. Unfortunately, they were never given the chance. Mr. Healey obviously elected not to follow the approach taken by an official of another UFCW local who had been only nominally involved in the first campaign, who testified that, "I lost, so I just moved on". Mr. Healey, regrettably, just kept going.

11. Indeed, the involvement of the other official in the first campaign is instructive for another reason. In an effort to rebut evidence called by the employer to establish that the International and the Local were involved in a scheme whereby it was always the intention of the International to "transfer" any bargaining rights it might win in the first application to the Local, the official (and others from the International) testified that it was his Local - 1993 - and not Local 1977 that was the intended recipient of the bargaining rights. This fact, together with evidence from another of the applicant's witnesses to the effect that an official of the International decides "which local employees go into" even where, it would seem, the International is the applicant, tends to reduce the significance that the Board can attach to the separate legal identities of the applicant and the International in this case. Finally, it is noteworthy that the same official, who also holds senior office with the International, could recall no other case in which a local commenced an organizing campaign for the same bargaining unit within days of the International having lost a vote.

12. In the result, and having regard to all of the foregoing and the Board's decision in *Titan Tool and Die Limited*, we decline to entertain the application. To the extent that this decision may be seen by the applicant as something as departing from the Board's former approach to the exercise of its discretion set out in such cases as *The Clorox Company of Canada Ltd.* [1980] OLRB Rep. Feb. 184 and *Creeds Storage Ltd.* [1984] OLRB Rep. May 712, we note that the matter has never been quite so "cut and dried" as the applicant suggests and, to some extent at least, the cases are distinguishable for the reasons given by employer counsel in argument.

13. "Entertain", it must be added, is something of an odd choice of words in a labour relations statute. However, we do not believe that by receiving the application and by processing it to this point the Board has irrevocably committed itself to some other form of resolution. To conclude otherwise would require the Board to litigate such issues before any votes were held, thereby frustrating another important statutory objective. We prefer an interpretation of this term that is compatible with the policy of "quick votes" and which still allows the provision room to operate.

14. For the sake of completeness, and for the reasons given in *Titan Tool and Die Limited*, the Board is of the view that the "mandatory" bar does not apply. We are also satisfied that the provisions of the Act dealing with the holding of votes and the imposition of bars in other circumstances do not displace the discretion conferred by section 111(2)(k). Given that we are dealing here with at least a nominally different "applicant", we are also of the view that the first part of section 111(2)(k) does not apply. Hence the exercise of our discretion under the latter part.

15. Finally, we decline to go further and impose a bar on any subsequent applications. While it is true that this employer has been subject to a statutory freeze for an almost uninterrupted period of 18 months, this is at least partly the product of the length of the present litigation - a factor to which the conduct of both parties and, indeed, the Board's scheduling, has contributed. It is not something that

can be laid entirely at the feet of the applicant. Moreover, the Board was made aware of no case (whether it be in the context of an application for certification or an application to terminate bargaining rights) in which the refusal to entertain a second application (the rationale for *Venture Industries Canada, Ltd.*, [1993] OLRB Rep. July 707 included that it was really a third) led to a bar on a subsequent application. Although Ms. Rundle would clearly have favoured a somewhat different result, believing that a reasonable “cooling-off” period is warranted in the circumstances (which include the lengthy and acrimonious nature of the litigation and the apparent dissension in the workplace), the Board as a whole is of the view that the balancing of interests between employee freedom of choice and the factors underlying the refusal to entertain provision favour no such bar. Any further applications will need to be considered by the panel receiving them.

16. Finally, and while joining in the Board’s decision for the reasons given, Mr. Montague is troubled by its timing. Mr. Montague holds passionately to the view that this is not the best of times for trade union organizing in the Province of Ontario and believes that any decision that precludes effect being given to employee wishes is, according to the express purposes of the current legislation, to be avoided. However, every principle has its limits and, regrettably, those limits were reached in this case.

17. Accordingly, the Board exercises its discretion to refuse to entertain this application.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1998

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2947-94-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. Ontario Hydro (Respondent) v. Power Workers' Union, CUPE Local 1000, Labourers' International Union of North America, Local 1059, Electrical Power Systems Construction Association (EPSCA) (Intervenors)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ontario Hydro in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ontario Hydro in all sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed under the P.W.U. collective agreement with Ontario Hydro, save and except plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed under the U.A. collective agreement with EPSCA, and save and except for non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3010-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Ontario Hydro (Respondent) v. Electrical Power Systems Construction Association (EPSCA), Power Workers' Union, CUPE Local 1000, Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Intervenors)

Unit: "all construction labourers in the employ of Ontario Hydro in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Ontario Hydro in all sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except construction labourers employed under the P.W.U. collective agreement with Ontario Hydro, save and except construction labourers employed under the Ontario Allied Construction Trades Council collective agreement with EPSCA, and save and except for non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0994-97-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses, Sarnia-Lambton Branch (Respondent) v. The Practical Nurses Federation of Ontario (Interested Party)

Unit: "all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses, Sarnia-Lambton Branch in the City of Sarnia, save and except Directors and Nurse Managers and persons above the rank of Director and Nurse Manager and persons for whom any trade union held bargaining rights as of June 19, 1997" (54 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	33
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	10

Number of ballots segregated and not counted

1

1039-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. National Homes Inc. (Respondent)

Unit: "all construction labourers in the employ of the responding party in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1

3205-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil des écoles séparées catholiques du district de Timmins (Respondent)

Unit: "les aides-enseignantes et aides-enseignants à l'emploi du Conseil des écoles séparées catholiques du District de Timmins dans ses écoles élémentaires et secondaires o le français est la langue d'enseignement" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	2

3820-97-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Industrial Maintenance Service (Sarnia) Ltd. (Respondent) v. Labourers' International Union of North America, Local 1089 (Intervener)

Unit: "all boilermakers and boilermakers' apprentices in the employ of Industrial Maintenance Service (Sarnia) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	4

3821-97-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Industrial Maintenance Service (Sarnia) Ltd. (Respondent) v. Labourers' International Union of North America, Local 1089 (Intervener)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Industrial Maintenance Service (Sarnia) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	8
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Number of persons who cast ballots	9
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	4

4294-97-R: United Steelworkers of America (Applicant) v. Riverwood Retirement Home (Respondent)

Unit: "all employees of Riverwood Retirement Home in the Town of New Tecumseth, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff" (32 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	9

4679-97-R: Labourers' International Union of North America, Local 506 (Applicant) v. Giffin Sheet Metals Limited (Respondent)

Unit: "The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council in respect of all construction labourers in the employ of Giffin Sheet Metals Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Giffin Sheet Metals Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3

0099-98-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of South Frontenac (Respondent)

Unit: "all employees of the Corporation of the Township of South Frontenac, in the Township of South Frontenac, save and except Roads Superintendent, Chief Building Official, persons above the rank of Chief Building Official, volunteer firefighters, secretary to the Clerk-Administrator and students employed during the school vacation period" (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

0221-98-R: Canadian Union of Public Employees (Applicant) v. LaVerendrye Non Profit Supportive Housing Corporation (Respondent)

Unit: "all Employees of the LaVerendrye Non Profit Supportive Housing Corporation in the Town of Fort Frances, save and except Supervisors and persons above the Rank of Supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

0235-98-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. The Glengarry News Limited (Respondent)

Unit: "all office and newspaper production employees regularly employed for less than 24 hours a week by the employer at its Alexandria location, save and except students employed for the school vacation period, freelance writers and freelance correspondents, mailroom employees, term casuals irregularly employed for a specific term or task, managers and persons above the rank of manager" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2

0317-98-R: Canadian Union of Public Employees (Applicant) v. Nisbet Lodge Inc. (Respondent)

Unit: "All employees of Nisbet Lodge Inc., save and except Supervisors, persons above the rank of Supervisor and Secretary/Receptionist to the Executive Director" (127 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	127
Number of persons who cast ballots	89
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	80
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	33
Number of ballots segregated and not counted	9

0489-98-R: United Steelworkers of America (Applicant) v. Shepherd Products Inc. (Respondent)

Unit: "all employees of Shepherd Products Inc. in the Town of Markham, save and except forepersons, persons above the rank of foreperson, and office and sales staff" (302 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	302
Number of persons who cast ballots	285
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	251
Number of segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of spoiled ballots	7
Number of ballots marked in favour of applicant	175
Number of ballots marked against applicant	71
Number of ballots segregated and not counted	32

0505-98-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Parkdale Community Health Centre (Respondent)

Unit: "all employees of Parkdale Community Health Centre in the City of Toronto, save and except Assistant Executive Directors, persons above the rank of Assistant Executive Director, Doctors, Clinical Team Leaders, Program Coordinators, Program Directors, Bookkeepers, Administrative Assistants, Property and Purchasing Coordinators and employees employed in a relief/locum relief capacity on a term contract of three (3) months or less which is not renewed in such a way so as to give rise to more than three (3) months of employment in any five (5) month period" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	32
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	4

0536-98-R: National Employees Association of Canada (Applicant) v. Bren-Gar Tax Services (Respondent)

Unit: "all employees of Bren-Gar Tax Services, save and except supervisors and those above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

0540-98-R: International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Canadian Technical Restoration (Ontario) Inc. (Respondent)

Unit: "all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Canadian Technical Restoration (Ontario) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Canadian Technical Restoration (Ontario) Inc. in all sectors of the construction industry in the City of Toronto (formerly the Municipality of Metropolitan Toronto), the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

0544-98-R: Amalgamated Transit Union, Local 107 (Applicant) v. The Hamilton Street Railway Company (Respondent)

Unit: "all casual employees employed in the Maintenance Department of The Hamilton Street Railway Company in the Regional Municipality of Hamilton-Wentworth" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0596-98-R: Laundry & Linen Drivers and Industrial Workers Union, Local 847 affiliated with International Brotherhood of Teamsters, AFL-C10 (Applicant) v. Future Focus Health Systems Inc. (Respondent)

Unit: "all employees employed by Future Focus Health Systems Inc. in the City of Toronto, save and except Office Manager and persons above the rank of Office Manager" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0642-98-R: International Union United Automobile, Aerospace & Agricultural Implement Workers of America UAW (UAW) (Applicant) v. Unitec Inc. 629728 Ontario Ltd. operating as Entropex (Respondent)

Unit: "all employees of Unitec Inc. 629728 Ontario Ltd. operating as Entropex in the city of Sarnia, save and except supervisors, persons above the rank of supervisor, office staff, sales staff, clerical staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (53 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	10

0668-98-R: International Union of Operating Engineers, Local 772 (Applicant) v. The Copley, Noyes and Randall Ltd. (Respondent)

Unit: "all sewing machine mechanics of the Copley, Noyes and Randall Ltd., in the region of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, office, clerical, design and sales staff and persons already covered by subsisting collective agreements" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	4

0674-98-R: United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Applicant) v. Mevotech Inc. (Respondent)

Unit: "all employees employed by Mevotech Inc. in the Province of Ontario, save and except Warehouse Manager, persons above the rank of Warehouse Manager, supervisors, office personnel, clerical and sales staff and students

employed during the school vacation period” (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	72
Number of persons who cast ballots	55
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	55
Number of ballots marked in favour of applicant	49
Number of ballots marked against applicant	6

0675-98-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: “all employees of Waterford Building Maintenance Inc. engaged in cleaning and maintenance at Meadowvale Corporate Centre, 2000 Argentia Road, in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period” (13 employees in unit)

Number of names of persons on revised voters’ list	13
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	11
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	4

0693-98-R: Laundry & Linen Drivers and Industrial Workers Union, Local 847 affiliated with International Brotherhood of Teamsters (Applicant) v. Work Wear Corporation of Canada, Ltd., A Subsidiary of G & K Services Inc., Metro West Unit (Respondent)

Unit: “all linen supply route men and laundry drivers of Work Wear employed at Metro West, in the City of Etobicoke, save and except salesmen, supervisors and persons above the rank of supervisor” (22 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	22
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	19
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	3

0694-98-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. West-Tech Finishing Inc. (Respondent)

Unit: “all employees of West-Tech Finishing Inc. in the City of Brampton, save and except supervisors, those above the rank of supervisor, office and clerical staff, and sales staff” (39 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	35
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	32
Number of segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	2

0700-98-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. F-K-P Tool Manufacturing Limited (Respondent)

Unit: "all employees of F-K-P Tool Manufacturing Limited in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff, sales staff and students employed during the school vacation period" (136 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	143
Number of persons who cast ballots	139
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	130
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	68
Number of ballots marked against applicant	66
Number of ballots segregated and not counted	1

0705-98-R: Ajax Precision Employees Association (Applicant) v. Triax Manufacturing, Division of Ajax Precision Manufacturing Limited (Respondent)

Unit: "all employees of Triax Manufacturing, Division of Ajax Precision Manufacturing Limited in the Regional Municipality of Peel, save and except supervisors, persons above the rank of supervisor, office staff, sales staff, temporary employees and students and employees in bargaining units for whom any trade union held bargaining rights as of May 20, 1998," (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2

0726-98-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Brad-Lea Meadows Limited c.o.b. Best Western Wheels Inn Resort & Conference Centre (Respondent)

Unit: "all employees of Brad-Lea Meadows Limited c.o.b. Best Western Wheels Inn Resort & Conference Centre employed at its hotel in the City of Chatham, Ontario, save and except supervisors, persons above the rank of supervisor and Executive Secretary" (448 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	448
Number of persons who cast ballots	350
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	313
Number of segregated ballots cast by persons whose names appear on voter's list	33
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	202
Number of ballots marked against applicant	116
Number of ballots segregated and not counted	32

0799-98-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Sheraton Gateway Hotel (Respondent)

Unit: "all employees of the respondent at the Sheraton Gateway Hotel, Toronto International Airport, Terminal 3, Mississauga, Ontario, save and except supervisors and those above the rank of supervisor, office, clerical, sales and conference services, reservations, communications, security staff, co-op students and students employed during the school vacation periods" (208 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	208
Number of persons who cast ballots	187

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	165
Number of segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	98
Number of ballots marked against applicant	67
Number of ballots segregated and not counted	22

0806-98-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Courtesy Dodge Chrysler (1988) Inc. (Respondent)

Unit: "all employees of Courtesy Dodge Chrysler (1988) Inc. in the City of Windsor, save and except supervisors, persons above the rank of supervisor and employees covered by subsisting Collective Agreements" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	22

0824-98-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Scarborough Management Ltd. c.o.b. as Holiday Inn Express (Respondent)

Unit: "all employees of Scarborough Management Ltd. c.o.b. as Holiday Inn Express at 50 Estate Drive in the City of Toronto, save and except front desk employees, office and clerical employees, breakfast hostesses, supervisors and persons above the rank of supervisor" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	5

0825-98-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Stewart Heating & Air Conditioning Inc. (Respondent)

Unit: "all employees of Stewart Heating & Air Conditioning Inc. in the City of Brampton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

0837-98-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. American Income Life Insurance Co. (Respondent)

Unit: "all employees of American Income Life Insurance Co. in the Province of Ontario, save and except supervisory employees and those above the rank of supervisor or persons having a general agent, master general agent or provincial general agent, contract" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12

0860-98-R: Service Employees International Union, Local 210 (Applicant) v. University of Windsor (Respondent)

Unit: "all clerical, secretarial and office employees employed by the University of Windsor at Windsor, Ontario, save and except: supervisors and persons above the rank of supervisor; persons employed to undertake specific sponsored research projects; full and part-time officers of instruction together with instructors, sessional appointees, teaching assistants and postdoctoral fellows engaged in teaching and/or research; medical doctors and registered nurses; professional librarians; persons employed in the University Libraries holding the rank of department head or above; administrative assistants and research assistants and systems analysts and persons above such ranks employed in the University libraries; persons regularly employed for more than 24 hours per week; students; and persons engaged in the following positions: Secretary to the President; one (1) Secretary to each Vice-President; one (1) Secretary to each Assistant Vice-President; Secretary to the Associate Vice-President - Academic; Secretary to the Secretary and General Counsel of the University; Secretary to the Ombudsperson and Race Relations Officer; Secretary to the Clerk of the Senate; all staff Department of Human Resources; Secretary to the Assistant Director of Finance - Accounting and Systems; Secretary to the Assistant Director of Finance - Planning and Budgets; Programmers and Systems Analysts; Secretary to the Manager of Computing Services; Secretary to the Secretary of the Board of Governors; Secretary to the Registrar; one (1) Secretary to each Administrative Director and persons above the rank of Administrative Director; Special Assistants to Deans; Secretaries to the University Librarian; and Secretary to the Law Librarian; Telecommunication Supervisor; Assistant Registrars; Chauffeur; one (1) Operator, Word Processing; Institutional Analyst; and save and except persons covered by subsisting Collective Agreement with the C.A. W. Local 195; Canadian Union, Local 100; Canadian Union of Public Employees, Local 1393; and the Canadian Union of Public Employees, Local 1001, and Service Employees Union, Local 210" (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	7

0871-98-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Corporation of the Township of White River (Respondent)

Unit: "all employees of The Corporation of the Township of White River in the Township of White River, save and except supervisors, persons above the rank of supervisor, and any employees for which a trade union held bargaining rights as of the date of filing of this application" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0928-98-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Provigo Distribution Inc. (c.o.b. Maxi Orangeville) (Respondent)

Unit: "all employees of Provigo Distribution Inc. c.o.b. as Maxi Orangeville, at 95 First Street, in the Town of Orangeville, save and except Store Director, 2 Assistant Store Directors, 9 Department Managers, office employees 2 inventory controllers and management trainees" (110 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	88
Number of persons who cast ballots	71
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	63
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	7

0967-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. at 60 Bloor Street West, 77 Bloor Street West and 101 Bloor Street West, in the City of Toronto, save and except non-working forepersons and persons above the rank of non-working foreperson" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

0761-98-R: La Centrale des syndicats francophones de l'Ontario (Applicant) v. le Simcoe County District School Board (Respondent) v. Ontario Public Service Employees Union (Syndicat des employés de la fonction publique de l'Ontario) (Intervener)

Applications for Certification Dismissed Subsequent to Vote

2283-97-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Burman & Fellows Group Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Burman & Fellows Group Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of Burman & Fellows Group Inc. in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	4

3388-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil des écoles séparées catholiques du district de Timmins (Respondent) v. Association des employé(e)s du conseil des écoles séparées du district de Timmins (Intervener)

Unit: "le personnel de secrétariat à l'emploi du Conseil des écoles séparées catholiques du District de Timmins dans ses écoles élémentaires et secondaires o le français est la langue d'enseignement. Également, le personnel de secrétariat oeuvrant dans la section de langue française du Conseil des écoles séparées catholiques du District de Timmins, ainsi que le personnel de secrétariat oeuvrant dans la composante francophone de la Centrale du conseil à l'exception des postes suivants: - poste d'adjoint de direction (présentement occupé par madame Julie Bisson) - poste de secrétaire de direction (présentement occupé par madame Diane Cameron), - poste de secrétaire de surintendant (présentement occupé par madame Lucie Hatton) - poste de gérante de bureau à l'école secondaire Thériault) présentement occupé par madame Ginette Cournoyer" (39 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	27
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	3

4207-97-R: United Steelworkers of America (Applicant) v. Slotex, Inc. (Respondent)

Unit: "all employees of Slotex, Inc., at 66 and 80 Jutland Road in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (354 employees in unit)

Number of names of persons on revised voters' list	393
Number of persons who cast ballots	374
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	349
Number of segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	151
Number of ballots marked against applicant	196
Number of ballots segregated and not counted	25

0440-98-R: Labourers' International Union of North America, Local 506 (Applicant) v. Diplock Floor Ltd. (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non- working foremen, persons above the rank of non-working foreman, employees for whom bargaining rights are already held by the Applicant and/or any other affiliated bargaining agent of the designation of Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council and employees covered by the subsisting Collective Agreement between the Applicant and the Respondent. For the purposes of clarity, employees engaged in cement finishing, waterproofing and restoration are included in the bargaining unit." (14 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	12
Number of ballots segregated and not counted	3

0559-98-R: I.W.A. Canada, Local 2995 (Applicant) v. 903162 Ontario Limited c.o.b. as Fortier Valu-Mart (Respondent)

Unit: "all employees of Fortier Valu-Mart in the Town of Hearst, save and except store manager, persons above the rank of store manager and office staff" (65 employees in unit)

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	64
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	55
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	35
Number of ballots segregated and not counted	9

0701-98-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Fidelitas Holding Company Limited c.o.b. as Cartier Place & Towers Suite Hotels (Respondent)

Unit: "all employees of Cartier Place & Towers Suite Hotels in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisors, front desk, office and sales staff" (45 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	7

0747-98-R: Labourers' International Union of North America Local 183 (Applicant) v. New York Window Cleaning Company, Limited o/a Jenga Holdings and Best Janitorial Services Inc. (Respondents)

Unit: "all cleaners employed by the Responding Party at 1477 Mississauga Valley Boulevard and 1547 Mississauga Valley Boulevard in Mississauga, Ontario, save and except supervisors and persons above the rank of supervisor." (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

0820-98-R: United Food & Commercial Workers, Local 206, Chartered by the United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Applicant) v. Niko Investments carrying on business as Lick's Burger & Ice Cream Shops Inc. Brampton, Ontario (Respondent)

Unit: "all employees of Niko Investments carrying on business as Lick's Burger & Ice Cream Shops Inc. in the City of Brampton, Ontario, save and except Store Manager and persons above the rank of Store Manager, office and clerical staff and sales staff" (58 employees in unit)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	37
Number of ballots segregated and not counted	4

0826-98-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Stewart Heating & Air Conditioning Inc. (Respondent)

Unit: "all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Stewart Heating & Air Conditioning Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Stewart Heating & Air Conditioning Inc. in all other sectors of the construction industry in the City of Toronto (formerly the Municipality of Metropolitan Toronto), the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

0891-98-R: Ontario Public Service Employees Union (Applicant) v. Brennan House (The Good Shepherd Youth Centres) (Respondent)

Unit: "all employees of Brennan House owned and operated by The Good Shepherd Youth Centres in the Municipality of Hamilton-Wentworth, save and except Program Co-ordinator, Supervisors and those above the rank of Supervisor" (16 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	8

0893-98-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hy & Zel's The Warehouse Drugstore Ltd. (Respondent)

Unit: "all employees of Hy & Zel's The Warehouse Drugstore Ltd. at 605 Rogers Road in the City of Toronto, save and except Assistant Store Manager and persons above the rank of Assistant Store Manager, Point of Sale Co-ordinators, Graduate and Undergraduate Pharmacists including Pharmacy Interns and Apprentice Pharmacists" (44 employees in unit)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	1

Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

2300-97-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Deluxe Toronto Limited (Respondent)

0557-98-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853 (Applicant) v. Fireworks Consulting & Contractors Inc. (Respondent)

0873-98-R: The National Employees Association of Canada (Applicant) v. Huron Bay Cooperative Inc. (aka) Teeswater Cooperative Inc. (Respondent)

FIRST AGREEMENT - DIRECTION

0883-98-FC: WW Canada Corp. Operating as Travelodge London Hotel (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3706-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Steeplejack Service and City & District Steeplejacks Limited (Respondents) (*Withdrawn*)

2002-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 4268 (Applicant) v. Canadian Waste Services Inc. (Respondent) v. Big Bear Service Employees' Association (Intervener) (*Withdrawn*)

2398-97-R: International Brotherhood of Painters and Allied Trades, Local 1819 (Glaziers) (Applicant) v. George Schneider & Son Glazing Limited, Saturn Metal Inc. and Glassic Images Inc. (Respondents) (*Dismissed*)

3721-97-R: L'Hôpital régional de Sudbury Regional Hospital Corporation (Applicant) v. C.U.P.E., Local 161 & 1023, and Ontario Public Service Employees Union (Respondents) v. Ontario Nurses' Association (Intervener) (*Granted*)

3881-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1795 (Glaziers) (Applicant) v. Felice Aluminum & Glass Ltd. and Rainbow Glass (Niagara) Inc. (Respondents) (*Granted*)

4461-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Novak Electric Co. Ltd. and N.A.B. Electric Co. Ltd. (Respondents) (*Endorsed Settlement*)

5021-97-R: The United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. Loeb Inc. (St. Catharines) and Loeb Inc. - The Orange Store (Respondents) (*Granted*)

0394-98-R: Brewery, General and Professional Workers' Union (Applicant) v. Paxton Transport Limited, Paxton Transport Limited (Courier Division) and 543506 Ontario Inc. c.o.b. as Kawartha Driver Services (Respondents) (*Withdrawn*)

0637-98-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Energy Watch Inc. (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

3706-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Steeplejack Service and City & District Steeplejacks Limited (Respondents) (*Withdrawn*)

2002-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 4268 (Applicant) v. Canadian Waste Services Inc. (Respondent) v. Big Bear Service Employees' Association (Intervener) (*Withdrawn*)

2398-97-R: International Brotherhood of Painters and Allied Trades, Local 1819 (Glaziers) (Applicant) v. George Schneider & Son Glazing Limited, Saturn Metal Inc. and Glassic Images Inc. (Respondents) (*Dismissed*)

3721-97-R: L'Hôpital régional de Sudbury Regional Hospital Corporation (Applicant) v. C.U.P.E., Local 161 & 1023, and Ontario Public Service Employees Union (Respondents) v. Ontario Nurses' Association (Intervener) (*Granted*)

3881-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1795 (Glaziers) (Applicant) v. Felice Aluminum & Glass Ltd. and Rainbow Glass (Niagara) Inc. (Respondents) (*Granted*)

4461-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Novak Electric Co. Ltd. and N.A.B. Electric Co. Ltd. (Respondents) (*Endorsed Settlement*)

5021-97-R: The United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. Loeb Inc. (St. Catharines) and Loeb Inc. - The Orange Store (Respondents) (*Granted*)

0637-98-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Energy Watch Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0174-98-R: Robert Barr, on his own behalf and on behalf of a group of employees of E.N.H. Electric Ltd. (Applicant) v. International Brotherhood of Electrical Workers, Local 586, International Brotherhood of Electrical Workers Construction Council of Ontario (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of E.N.H. Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	3

0325-98-R: Chris Laskey and Paul Tremblay (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent) v. Q-Tech Limited (Intervener)

Unit: "all journeymen and apprentice insulation and asbestos workers in the Province of Ontario" (4 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	4
Number of ballots segregated and not counted	2

0371-98-R: Roman Kuliczowski, on his own behalf and on behalf of a Group of Employees (Applicant) v. Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and

Pipefitting Industry of the United States and Canada (Respondent) v. Fix-It-All Plumbing & Heating Ltd. (Intervener)

Unit: "all plumbers and plumbers' apprentices and all steamfitters and steamfitters' apprentices in the employ of the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada in the industrial commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked against respondent	2

0431-98-R: Clark Elbourn and Employees of Auty Printing Canada Inc. (Applicant) v. Graphic Communications International Union, Local 100-M (Respondent) v. Auty Printing Canada Inc. (Intervener)

Unit: "all employees of the company at its plant in the County of Peel, save and except non-working foremen, persons above the rank of non-working foreman, and office and sales staff" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of spoiled ballots	1
Number of ballots marked against respondent	5

0617-98-R: Gerald Sherlock, on his own behalf and on behalf of a group of employees of 1070554 Ontario Inc., c.o.b. Meadowlands Esso (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Respondent) v. 1070554 Ontario Inc., c.o.b. as Meadowlands Esso (Intervener)

Unit: "all employees of 1070554 Ontario Inc. (Meadowlands Esso) at 1584 Merivale Road, save and except Managers and persons above the rank of Manager" (11 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked against respondent	11

0829-98-R: Denise Coombs (Applicant) v. Office and Professional Employees International Union (Respondent) (*Granted*)

1032-98-R: Al Mossman (Applicant) v. International Brotherhood of Electrical Workers, Local Union 1687 and Larry Lineham (Respondent) (*Dismissed*)

1051-98-R: Cathy Gascoyne (Applicant) v. International Brotherhood of Electrical Workers Local 636 (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1034-98-U: Co-Steel Lasco (Applicant) v. International Union of Operating Engineers, Local 793 and Gale Jacklin, and Jim Kitts, and George Needham (Respondent) v. Loc Pipe Incorporated (Intervener) (*Withdrawn*)

1073-98-U: Co-Steel Lasco (Applicant) v. International Union of Operating Engineers, Local 793 and Gale Jacklin, Vito Montagnese, Jim Kitts, and George Needham, (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1110-98-U: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Labourers' International Union of North America, Local 183, Roger Quinn, Tim McGowan, Jack Oliveira and Rocco Di Giovanni (Respondent) (*Withdrawn*)

1113-98-U: Bridgecon Construction Ltd. (Applicant) v. Labourers' International Union of North America, Local 183, Roger Quinn, Rocco Di Giovanni, Jack Oliveira and Tim McGowan (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

4179-95-U: Dennis Beniuk (Applicant) v. United Food and Commercial Workers Local 459 (Respondent) v. Omstead Foods Limited (Intervener) (*Dismissed*)

0463-96-U; 1072-97-U: John Crnekovic (Applicant) v. Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (Respondent) v. Xerox Canada Ltd. (Intervener) (*Withdrawn*)

1986-97-U: Jeannette Ouimet Local 469 (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Hotel Dieu Hospital (Intervener) (*Terminated*)

1998-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 4268 (Applicant) v. Canadian Waste Services Inc. (Respondent) v. Big Bear Service Employees' Association (Intervener) (*Withdrawn*)

2379-97-U: Altamir Martinez (Applicant) v. C.A.W. Local 222 (Respondent) (*Withdrawn*)

3155-97-U: Metropolitan Toronto Demolition Contractors Inc. (Applicant) v. The Dutchman and G. & N. Contracting (Respondents) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council (Intervener) (*Granted*)

3303-97-U: Arlene Isenberg (Applicant) v. Hillel Academy Teachers' Association and Ottawa Talmud Torah Board (Respondents) (*Withdrawn*)

3577-97-U: Helga Tibaldi (Applicant) v. Hotel Employees Restaurant Employees Union-Local 75 (Respondent) v. The Westin Prince (Intervener) (*Dismissed*)

3667-97-U: Niraimathiraja Mayilvaganam (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Withdrawn*)

3691-97-U: Ivan Cofre (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Respondent) (*Dismissed*)

3883-97-U: Teamsters, Chemical, Energy and Allied Workers Local 424 (Applicant) v. Medis Health and Pharmaceutical Services Inc. (Respondent) v. Dynamex Express Inc. (Intervener) (*Terminated*)

4064-97-U: United Steelworkers of America (Applicant) v. Accucut Profile & Grinding Ltd. (Respondent) (*Withdrawn*)

4351-97-U: Paula Twaddle (Applicant) v. Service Employees International Union, Local 204, A.F.L., C.I.O., C.L.C. (Respondent) (*Withdrawn*)

4392-97-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Provincial Partitions Inc. (Respondent) (*Withdrawn*)

4433-97-U: Steve Mahun (Applicant) v. Moving Picture Studio Production Technicians, Local 873 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada (Respondent) (*Dismissed*)

4512-97-U: Wayne MacDonald and Jamie Brunsten (Applicant) v. London & District Service Workers' Union, Local 220 (Respondent) (*Dismissed*)

4569-97-U: Guilhermina De Abreu (Applicant) v. Toronto Industrial Council, United Food & Commercial Workers' International Union (Respondent) (*Withdrawn*)

4591-97-U: Members of Local 54 ONA - Clarke Institute of Psychiatry (Jeanne Favaro, Merlyn James, Rosemary Kolesar, Karyn Maxness, Karen Kelly, Norma Terro, Pat Jarvis, Sena Albino, Mary Ann McKinnon, Lucy Haswell, AUSA Rosales) (Applicant) v. Ontario Nurses' Association (Respondent) v. Addiction and Mental Health Services Corporation (Intervener) (*Dismissed*)

4631-97-U: Ontario Public Service Employees Union (in its own behalf and on behalf of Richard Tyssen and Bruce Monk) (Applicant) v. The Supportive Housing Coalition of Metropolitan Toronto (Respondent) (*Withdrawn*)

4733-97-U: Reginald Byron (Applicant) v. Metro Toronto Housing Authority and Canadian Union of Public Employees Local 767 (Respondents) (*Dismissed*)

4793-97-U: Christian Labour Association of Canada (Applicant) v. Delta Chi Beta Early Childhood Centre (Windsor) Inc. (Respondent) (*Withdrawn*)

4933-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Corma Inc. (Respondent) (*Withdrawn*)

4985-97-U: Greg Horton (Applicant) v. Tackaberry Heating Supplies Limited (Respondent) (*Withdrawn*)

4987-97-U: Dr. David Powell (Applicant) v. Board of Directors Association of Part-time Professors Union, University of Ottawa (APTPUO) (Respondent) (*Withdrawn*)

4990-97-U: Maria M. Oliveira (Applicant) v. United Food & Commercial Workers U.F.C.W. Local 175 (Respondent) (*Dismissed*)

0135-98-U: Barry Aucott (Applicant) v. The United Food and Commercial Workers International Union, Local 208 and (Respondent) v. C.F. Edible Oils Inc. c.o.b. as CanAmera Foods (Intervener) (*Terminated*)

0137-98-U; 5038-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Gill Machine Works (Ont) Ltd. (Respondent) (*Withdrawn*)

0374-98-U: Jo-Anne Elizabeth Primeau (Applicant) v. Paul Middleton-Vice President (East) Diane Senko- Chief Steward Local 268 S.E.I.U., Doreen Archambeault-Director of Care (D.O.C.) (Respondent) (*Withdrawn*)

0455-98-U: Dinh Luu (Applicant) v. Edward Gilmore Demar & Fil Falco of Local Union 400U (Respondent) (*Withdrawn*)

0460-98-U: Miriam Gharraffi (Applicant) v. Teamsters Local 847 (Respondent) v. Goodwill Industries of Toronto (Intervener) (*Withdrawn*)

0490-98-U: Sumitava Saha (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. Holiday Inn on King (Intervener) (*Dismissed*)

0515-98-U: Edwin Dukhcharan (Applicant) v. Sommerville Packaging and Graphic Communications International Union, Local 500M (Respondents) (*Withdrawn*)

0531-98-U: R. Peter Boehme (Applicant) v. Canadian Security Union, Local 333 UFCW (Respondent) (*Withdrawn*)

0535-98-U: Julie Braaksma (Applicant) v. Canadian Union of Public Employees Local 19 (Respondent) (*Withdrawn*)

0541-98-U: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Wallwin Electric Services Limited (Respondent) (*Endorsed Settlement*)

0566-98-U: George Hatch (Applicant) v. King Scott (Respondent) v. Archie Bailie (Intervener) (*Withdrawn*)

0638-98-U: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Energy Watch Inc. (Respondent) (*Withdrawn*)

0644-98-U: Mary Collins (Applicant) v. Mildred Bailey Union President CUPE 1320 (Respondent) (*Withdrawn*)

0646-98-U: Sunny Pazhaidam (Applicant) v. Ron Piercey Bakery Confectionery and Tobacco Workers International Union, Local 264 (Respondent) (*Withdrawn*)

0659-98-U: David Randell Parkinson (Applicant) v. Griffin House Graphics (Respondent) v. Graphic Communications International Union, Local 500M (Intervener) (*Withdrawn*)

0683-98-U: Shirley E. Millar (Applicant) v. Graphic Communications International Union Local N-1 (Respondent) (*Withdrawn*)

0724-98-U: Canadian Union of Public Employees and its Local 2617 (Applicant) v. Ned Lathrop and the Corporation of the Township of Cumberland (Respondent) (*Withdrawn*)

0739-98-U: Canadian Union of Public Employees, Local 1764 (Applicant) v. Durham Access to Care (Respondent) (*Withdrawn*)

0757-98-U: Manuel Curado Ferreira (Applicant) v. Labourers' International Union of North America Local 183 (Respondent) (*Withdrawn*)

0822-98-U: Josip Sandic (Applicant) v. Liz Claiborne (Canada) Ltd. (Respondent) (*Dismissed*)

0831-98-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Stewart Heating & Air Conditioning Inc. (Respondent) (*Withdrawn*)

0888-98-U: WW Canada Corp. Operating as Travelodge London Hotel (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)

0920-98-U: Luigi Minoia (Applicant) v. Toronto East General Hospital (Respondent) (*Dismissed*)

0958-98-U: Angela Iafrate (Applicant) v. Star Valenti Ltd. (Respondent) (*Dismissed*)

0959-98-U: Mohamed T. Unoos (Applicant) v. H.E.R.E. Local 75 (Respondent) (*Dismissed*)

0966-98-U: Abitibi-Consolidated Inc. (Applicant) v. Communications, Energy and Paperworkers Union of Canada and its Locals 90, 92, 109, 132, 238 and 306 (Respondent) (*Granted*)

0969-98-U: CAW Local 200 (Applicant) v. Ned Korunic (Respondent) (*Dismissed*)

0985-98-U: Josip Sandic (Applicant) v. Liz Claiborne (Canada) Ltd., Mr. Trent Maclean (President), Kim Todd (Director of Finance & Operations), Kevin Moggy (Josip Sandic's Supervisor), Sandra Payne (Human Resources

Generalist), Roy Houston (Warehouse Manager), Michael Turnbull (Union Representative), Anna Cerovic (Union Representative), Harry Mohabir (Union Representative) (Respondent) (*Dismissed*)

1025-98-U: Ravenol A. Grant (Applicant) v. Brake Pro Ltd. (Respondent) (*Dismissed*)

1031-98-U: Mohamed T. Unoos (Applicant) v. H.E.R.E. Local 75 (Respondent) (*Dismissed*)

1074-98-U: Co-Steel Lasco (Applicant) v. International Union of Operating Engineers, Local 793 and Gale Jacklin, and Jim Kitts, George Needham, and Vito Montagnese, Jim Kitts, George Needham (Respondents) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

1115-98-M: International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 58 (Applicant) v. On Stage Entertainment Inc., Metropolitan Life Insurance Company and Clocktower Hotel Limited Partnership, c.o.b. "Sheraton Centre Toronto Hotel", Legends in Concert and On Stage Theatres Canada Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0780-98-M: Master Linen Service (Applicant) v. United Food and Commercial Workers International Union, Local 351 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

4674-97-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. The Electrical Power Systems Construction Association, Ontario Hydro, Millwright District Council of Ontario and its Local 2309 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3215-94-M: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (Respondent) (*Granted*)

1537-97-M: Ontario Public Service Employees Union, Local 353 (Applicant) v. Durham College of Applied Arts and Technology (Respondent) (*Terminated*)

0295-98-M: Canadian Union of Public Employees, Local 1750 (Applicant) v. Workplace Safety & Insurance Board (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1705-96-OH: Alonso Aragon and Wilson Joint Health and Safety Committee Members (Applicant) v. Toronto Transit Commission, Wilson Superintendent Ken Maddison, Wilson Superintendent Bryan Tyrrell, Wilson Assistant Superintendent Ted Galea, Wilson Assistant Superintendent Dennis Barr (Respondent) v. Amalgamated Transit Union Local 113 (Intervener) (*Dismissed*)

3269-97-OH: Ali Abdulkadir (Applicant) v. Dough Delight Inc. (Respondent) v. Bakery, Confectionery, Tobacco Workers' International Union Local 181 (Intervener) (*Dismissed*)

4484-97-OH: Gord Valin (Applicant) v. McAlpine Ford Lincoln Mercury Sales Ltd., McCars Auto Centre Limited, Terry Shuter, Debbie Fata (Respondents) (*Withdrawn*)

4574-97-OH: Tom McDonald (Applicant) v. City of Toronto, Mary Ellen Bench, Marc Kemerer, Sylvia Watson (Respondent) (*Withdrawn*)

4909-97-OH: Irene Kotsopoulos (Applicant) v. Toronto Hilton Hotel (Respondent) (*Terminated*)

0594-98-OH: Khampasong Inthisane (Applicant) v. Hillerichs and Bradsby (Respondent) (*Withdrawn*)

0722-98-OH: Ahmed Mohamed (Applicant) v. United Food and Commercial Workers' International Union, Local 351 (Respondent) (*Terminated*)

0908-98-OH: Lionel Drouin (Applicant) v. TRW Canada Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

3705-95-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Steeplejack Service and City & District Steeplejacks Limited (Respondents) (*Withdrawn*)

1139-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. The Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Withdrawn*)

2397-97-G: International Brotherhood of Painters and Allied Trades, Local 1819 (Glaziers) (Applicant) v. George Schneider & Son Glazing Limited, Saturn Metal Inc. and Glassic Images Inc., (Respondents) (*Granted*)

3034-97-G: Millwright District Council of Ontario (Applicant) v. Steelcon, Inc. (Respondent) (*Endorsed Settlement*)

3472-97-G: International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Ontario Hydro (Respondent) (*Withdrawn*)

3670-97-G: Masonry Council of Unions, Toronto and Vicinity and Bricklayers Masons Independent Union of Canada, Local 1 and Labourers' International Union of North America, Local 183 (Applicants) v. 696147 Ontario Inc. c.o.b. as Willowdale Masonry (Respondent) (*Granted*)

3812-97-G: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Mike Braovac Painting (Respondent) (*Granted*)

3948-97-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Diamond Bros. Carpentry Ltd. (Respondent) (*Endorsed Settlement*)

3952-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dufferin Drywall and Acoustics Ltd. (Respondent) (*Withdrawn*)

4460-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Novak Electric Co. Ltd. and N.A.B. Electric Co. Ltd. (Respondents) (*Endorsed Settlement*)

4931-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Andre Gauvreau Insulation (Respondent) (*Withdrawn*)

0210-98-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Great Atlantic & Pacific Company of Canada, Limited (Respondent) (*Withdrawn*)

0494-98-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Earls court Metal Industries Ltd. (Respondent) (*Withdrawn*)

- 0528-98-G:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondent) (*Terminated*)
- 0534-98-G:** United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Bellai Brothers Ltd. (Respondent) (*Endorsed Settlement*)
- 0547-98-G:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondent) (*Terminated*)
- 0613-98-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Crystaplex Plastics Ltd. and Laird Plastics (Canada) Inc. (Respondents) (*Granted*)
- 0624-98-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. Campbell-Cox Inc. (Respondent) (*Dismissed*)
- 0661-98-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Tacca Carpentry (Respondent) (*Endorsed Settlement*)
- 0670-98-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1005060 Ontario Incorporated o/a Silvercreek Formwork (Respondent) (*Granted*)
- 0695-98-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Major Sir Systems Ltd. (Respondent) (*Endorsed Settlement*)
- 0697-98-G; 0714-98-G; 4632-97-G:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Big B Steel Erectors Inc. (Respondent) (*Endorsed Settlement*)
- 0704-98-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Yonge Carpentry (Respondent) (*Endorsed Settlement*)
- 0706-98-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. York Elevators Limited (Respondent) (*Withdrawn*)
- 0712-98-G; 3277-97-G:** International Union of Bricklayers and Allied Craftsmen, Local 2, Toronto/Barrie, Ontario (Applicant) v. Limen Masonry Limited (Respondent); The Masonry Industry Employers Council of Ontario and Limen Masonry Limited (Applicant) v. International Union of Bricklayers' and Allied Craftworkers, Local #2 (Respondent) (*Withdrawn*)
- 0719-98-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. Esken Mechanical Contractors Inc. (Respondent) (*Granted*)
- 0727-98-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. B.F.C./Banister Majestic Inc. (Respondent) (*Withdrawn*)
- 0729-98-G; 0730-98-G:** Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Metric Contracting Services Corporation (Respondent) (*Withdrawn*)
- 0731-98-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. DCL Drywall Construction (2881195 Canada Inc.) (Respondent) (*Withdrawn*)
- 0738-98-G:** International Brotherhood of Painters and Allied Trades, Local Union 1824 (Applicant) v. Mike's Painting & Decorating Ltd. (Respondent) (*Granted*)
- 0758-98-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hodgson-Ferr Construction Ltd. (Respondent) (*Withdrawn*)

0765-98-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Avenue Structures Corporation (Respondent) (*Withdrawn*)

0768-98-G: Labourers' International Union Of North America, Local 837 (Applicant) v. Cormar Contracting Ltd., Cormar (1996) Contracting (Respondents) (*Withdrawn*)

0797-98-G: Kennedy Masonry Company Limited (Applicant) v. Bricklayers, Masons Independent Union of Canada Local 1, Labourers' International Union of North America, Local 183 and Masonry Council of Unions of Toronto and Vicinity (Respondents) (*Withdrawn*)

0798-98-G: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Wall II Wall Stucco Systems Inc. and Wall 2 Wall Systems (Respondents) (*Endorsed Settlement*)

0823-98-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Detail Plumbing Corp. (Respondent) (*Terminated*)

0836-98-G: Sheet Metal Workers' International Association, Local Union 235 (Applicant) v. Performance Metals, R & A Sheet Metal Ltd. (Respondents) (*Withdrawn*)

0881-98-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 736 (Applicant) v. Shewfelt & Dezaide Construction Limited (Respondent) (*Endorsed Settlement*)

0926-98-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Ferano Construction (Respondent) (*Withdrawn*)

0930-98-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Palmex Interior Systems Ltd. (Respondent) (*Endorsed Settlement*)

0945-98-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lapis Carpentry Inc. (Respondent) (*Endorsed Settlement*)

0987-98-G: Labourers' International Union of North America, Local 183 (Applicant) v. Power Sewer & Watermain Ltd., Power Contracting Ltd., and Power Contracting (1997) Ltd. (Respondents) (*Withdrawn*)

0988-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Standard Electric (Toronto 1985) Inc. (Respondent) (*Withdrawn*)

0990-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vantage Electrical (Respondent) (*Withdrawn*)

0991-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Davis-Yonge Electric (Respondent) (*Withdrawn*)

0993-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. C.S.E. Corporation Concept System Electric (Respondent) (*Withdrawn*)

0997-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Systems-Elect Ltd. (Respondent) (*Withdrawn*)

0998-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Power Station Construction (A Division of 1096748 Ontario Ltd.) (Respondent) (*Withdrawn*)

1000-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ultra Teck Electric (Respondent) (*Withdrawn*)

1008-98-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Mackie Moving Systems Corporation (Respondent) (*Endorsed Settlement*)

1119-98-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corp. (Respondent) (*Withdrawn*)

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

4131-97-PS: The Corporation of the City of Quinte West (Applicant) v. Canadian Union of Public Employees and its Local 799, Canadian Union of Public Employees and its Local 1665, Canadian Union of Public Employees and its Local 1203, Canadian Union of Public Employees, and International Union of Operating Engineers, Local 793 (Respondents) (*Terminated*)

4132-97-PS: Hastings and Prince Edward District School Board (Applicant) v. Canadian Union of Public Employees and its Local 1022 and Health Office and Professional Employees, A Division of the United Food and Commercial Workers International Union, Local 175 and 633 (Respondents) (*Granted*)

4182-97-PS: Niagara Catholic District School Board (Applicant) v. Canadian Union of Public Employees Local 1317 and the Ontario Secondary School Teachers' Federation (Respondent) (*Granted*)

4302-97-PS: Lambton Kent District School Board (Applicant) v. Canadian Union of Public Employees and its Locals 1238, 986, 1019, 1563 and OSSTF - DISTRICT 3 (Respondents) (*Granted*)

4418-97-PS: Office & Professional Employees International Union (Applicant) v. Northwest Catholic District School Board and Canadian Union of Public Employees (Respondents) (*Granted*)

4604-97-PS; 4605-97-PS: Toronto District School Board (Applicant) v. OSSTF et al. (see Schedule "A" attached) (Respondent/Interveners) (*Granted*)

0035-98-PS: Mississauga-Queensway Hospital (Applicant) v. Ontario Nurses' Association (Respondent) v. Health Care Council of Ontario (LIUNA), Practical Nurses Federation of Ontario, Ontario Public Service Employees Union, Association of Allied Health Professionals: Ontario, Canadian Union of Public Employees and its Locals 1106 and 3546 (Interveners) (*Granted*)

0382-98-PS: The Corporation of the Township of South Dundas (Applicant) v. Canadian Union of Public Employees and its Local 2311-03 (Respondent) (*Terminated*)

0741-98-PS: Toronto Civic Employees' Union, Local 416 Canadian Union of Public Employees (Applicant) v. Corporation of the City of Toronto (in its own capacity and c.o.b as the Toronto Parking Authority) (Respondent) v. Canadian Union of Public Employees, Local 79 (Intervener) (*Dismissed*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3312-96-U: David D. Stanley (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Seneca College of Applied Arts and Technology (Intervener) (*Denied*)

0230-98-U: Esmeline Cameron (Applicant) v. International Union, Local 204 (Respondent) (*Dismissed*)

0366-98-R: Taggart Construction Employees' Association (Applicant) v. Taggart Construction Limited (Respondent) v. Labourers' International Union of North America, Local 247, Labourers' International Union of North America, Local 517 (Interveners) (*Dismissed*)

0404-98-R: Elie Khalife, on his own behalf and on behalf of a group of employees of West-Way Taxi Nepean Ltd. (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Respondent) v. Westway Taxi Nepean Ltd. (Intervener) (*Denied*)

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APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Subsequent to Vote

1286-97-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Cy Rheault Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Cy Rheault Construction Ltd. the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Cy Rheault Construction Ltd. in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (18 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	20
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	17

4167-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Prince Edward (Respondent)

Unit: "all employees of The Corporation of the County of Prince Edward, save and except supervisors, persons above the rank of supervisor, office and clerical staff, facility manager and any person for whom a trade union held bargaining rights on the date of application" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	21
Number of ballots segregated and not counted	1

4470-97-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Goreski Roofing and Lathing Ltd. (Respondent)

Unit: "all roofers and their helpers and metalmen employed as dependent contractors by Goreski Roofing and Lathing Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, persons engaged in reroofing, hourly servicemen, flatroofers, aluminum/vinyl applicators, office, warehouse/shop and clerical employees" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
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Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6

4864-97-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Victorian Order of Nurses - Sudbury Branch (Respondent)

Unit: "all clerical and office employees in the employ of Victorian Order of Nurses - Sudbury Branch in the Regional Municipality of Sudbury, save and except Supervisors, persons above the rank of Supervisor, Administrative Assistant and Human Resources Clerk," (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	5

0004-98-R: Labourers' International Union of North America, Local 247 (Applicant) v. Belrock Construction Limited (Respondent)

Unit: "all construction labourers in the employ of Belrock Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all construction labourers in the employ of Belrock Construction Limited in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2

0147-98-R: Brewery, General and Professional Workers' Union (Applicant) v. Kawartha Driver Services (Respondent)

Unit: "all employees of Kawartha Driver Services engaged in the performance of courier services, in and out of the City of Peterborough, Ontario, save and except dispatchers, persons above the rank of dispatcher, office and sales staff, and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	11
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	2

0314-98-R: Local Union 47 Sheet Metal Workers International Association (Applicant) v. Mechtek Mechanical Limited (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Mechtek Mechanical Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ

of Mechtek Mechanical Limited in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7

0358-98-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 845580 Ontario Inc. o/a Scott Electric (Respondent)

Unit: "all journeymen and apprentice electricians in the employ of 845580 Ontario Inc. o/a Scott Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians in the employ of 845580 Ontario Inc. o/a Scott Electric in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

0508-98-R: The United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Applicant) v. Nor-Sham (Markham) Hotels Inc., c.o.b. Radisson Hotel Toronto-Markham (Respondent)

Unit: "all employees employed by Nor-Sham (Markham) Hotels Inc., c.o.b. Radisson Hotel Toronto-Markham in the Town of Markham, save and except supervisors, persons above the rank of supervisor, office, accounting, front desk, clerical and sales staff and students employed during the school vacation period" (97 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	144
Number of persons who cast ballots	93
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	36
Number of ballots segregated and not counted	15

0847-98-R: Service Employees International Union, Local 220 SEIU, AFL, CIO, CLC (Applicant) v. Dale Brain Injury Services Inc. (Respondent)

Unit: "all employees of Dale Brain Injury Services Inc. in the City of London, save and except Program Managers, the Director of Operations, the Director of Rehabilitation & Community Reintegration, the Financial Manager, Assistant to the Executive Director, the Executive Director, Community Outreach Co-ordinator and Students," (68 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	3

0863-98-R: Canadian Union of Public Employees (Applicant) v. MUC Shelter Corporation c.o.b. Sojourn House (Respondent)

Unit: "all employees of MUC Shelter Corporation c.o.b. as Sojourn House in the City of Toronto, save and except Administrative Assistant, shelter supervisor and persons above the rank of shelter supervisor" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	17
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	4

0876-98-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Bob Doupe c.o.b. as Brandco Plumbing (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Bob Doupe c.o.b. as Brandco Plumbing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Bob Doupe c.o.b. as Brandco Plumbing in all other sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

0879-98-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Blackshaw & Clarke Mechanical Contracting Limited (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Blackshaw & Clarke Mechanical Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Blackshaw & Clarke Mechanical Contracting Limited in all other sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton; the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

0924-98-R: United Steelworkers of America (Applicant) v. J. Ford & Co. Limited/La Cie J. Ford Limitee (Respondent)

Unit: "all employees of J. Ford & Co. Limited/La Cie J. Ford Limitee in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor, office, clerical and sales staff" (42 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	35
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Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	9

1016-98-R: United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Applicant) v. Cara Operations Limited (Respondent)

Unit: "all employees at Cara Operations Limited employed as serving staff, buspersons, kitchen staff, cashiers, bartenders and students at its Swiss Chalet Restaurant/Toast Cafe at 9222 Keele Street, in the Town of Concord, Ontario, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Managers" (58 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	58
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	3

1019-98-R: Ontario Public Service Employees Union (Applicant) v. Eastern Medical Services (Respondent)

Unit: "all employees of Eastern Medical Services in the Township of Osgoode, Regional Municipality of Ottawa-Carleton, save and except the owner/operator, administrative assistant, supervisors and persons above the rank of supervisor" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	6

1020-98-R: Forge Workers' Alliance Association (Applicant) v. 762822 Ontario Limited, o/a Demshe Products (Respondent)

Unit: "all employees of 762822 Ontario Limited, o/a Demshe Products in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, office and clerical staff, part-time employees and students employed during the school vacation or co-op term" (102 employees in unit)

Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

1035-98-R: Service Employees Union, Local 183 (Applicant) v. Health Care Services Group (Respondent)

Unit: "all employees of Health Care Services Group at 399 River Rd., Edgewood Care Centre, in the City of Vanier, save and except managers, and persons above the rank of manager," (10 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	6

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	6

1038-98-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Canadian Red Cross Society (Ontario Zone) (Respondent)

Unit: "all employees of the Canadian Red Cross Society (Ontario Zone) in the Homemaker Services Program in the District of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff and any employees for which a trade union held bargaining rights as of June 16, 1998, the date of filing of the Application" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	6

1042-98-R: Canadian Union of Operating Engineers and General Workers (CUOE) (Applicant) v. Baffin Inc. (Respondent)

Unit: "all employees of Baffin Inc. in the Regional Municipality of Hamilton Wentworth save and except supervisors, persons above the rank of supervisor, office, clerical and security employees" (140 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	228
Number of persons who cast ballots	188
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	161
Number of segregated ballots cast by persons whose names appear on voter's list	27
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	102
Number of ballots marked against applicant	58
Number of ballots segregated and not counted	27

1043-98-R: United Steelworkers of America (Applicant) v. Imperial Flavours Inc. (Respondent)

Unit: "all employees of Imperial Flavours Inc. at 7550 Torbram Road in the City of Mississauga, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff" (75 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	95
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	80
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	29
Number of ballots segregated and not counted	10

1070-98-R: Communications Workers of America Local 14022 (The Peterborough Typographical Union Local 248) (Applicant) v. Kinark Child and Family Services-Durham (Respondent)

Unit: "all employees of Kinark Child and Family Services-Durham Region employed in the residential and day school treatment program, save and except the Nurse, Maintenance, Housekeeper, Social Worker, Residential Supervisor of Educational Services, and persons above the rank of supervisor" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	1

1071-98-R: Communications Workers of America Local 14022 (The Peterborough Typographical Union Local 248) (Applicant) v. Kinark Child and Family Services-Durham (Respondent)

Unit: "all employees of Kinark Child and Family Services-Durham Region employed as Social Workers in the Family Services Program, save and except the Supervisor of Family Services and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	1

1072-98-R: United Steelworkers of America (Applicant) v. Hoogovens Refractory Services Inc. (Respondent)

Unit: "all employees of Hoogovens Refractory Services Inc. in the City of Sault Ste. Marie, save and except supervisors, those above the rank of supervisor, office, clerical, sales and technical staff and professional engineers within the meaning of the Labour Relations Act" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	3

1078-98-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. R. T. Contracting, the operating style of 1124854 Ontario Inc. (Respondent)

Unit: "all iron worker and iron worker apprentices in the employ of R. T. Contracting, the operating style of 1124854 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all iron worker and iron worker apprentices in the employ of R. T. Contracting, the operating style of 1124854 Ontario Inc. in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

1101-98-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Emu Plastics Limited (Respondent)

Unit: "all employees of Emu Plastics Limited, 3420 Pharmacy Avenue in the City of Toronto, save and except Foremen, persons above the rank of foreman, Quality Control employees, office employees and sales persons" (66 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	3

1105-98-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Bond Masonry (Conestogo) Ltd. (Respondent)

Unit: "all construction labourers in the employ of Bond Masonry (Conestogo) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Bond Masonry (Conestogo) Ltd. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1180-98-R: Brewery, General and Professional Workers' Union (Applicant) v. Med-Chem Health Care Limited (Respondent)

Unit: "all employees of Med-Chem Health Care Limited in the Regional Municipality of Durham, save and except employees already included in the Union's Metropolitan Toronto bargaining unit, persons employed in a confidential capacity with respect to labour relations, section heads or supervisors and persons above the rank of section head or supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1192-98-R: United Steelworkers of America (Applicant) v. MTD Metro Tool & Die Limited (Respondent)

Unit: "all employees of MTD Metro Tool & Die Limited in the City of Mississauga, save and except managers and persons above the rank of manager, office, clerical and sales staff" (88 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	88
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	78
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	59
Number of ballots marked against applicant	21
Number of ballots segregated and not counted	2

1200-98-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Rose E. Dee (International) Ltd. (Respondent)

Unit: "all employees of Rose E. Dee (International) Ltd. in the City of Toronto, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (132 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	115
Number of persons who cast ballots	105
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	89
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	80
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	16

1220-98-R: United Steelworkers of America (Applicant) v. Philip Enterprises Inc. (Respondent)

Unit: "all drivers of Philip Enterprises Inc. at 1131 Snow Valley Road in the City of Barrie and at 55 Vulcan Street in the City of Toronto, save and except supervisors, persons above the rank of supervisor, and employees currently represented by Teamsters Local Union 938 at 55 Vulcan Street in the City of Toronto" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

1222-98-R: Teamsters Local Union No. 419 (Applicant) v. Chiovitti Banana Co. Ltd. (Respondent)

Unit: "all employees of Chiovitti Banana Co. Ltd. at the Ontario Food Terminal in the City of Toronto excluding supervisors and foremen, persons above the rank of supervisor and foreman, office, sales and clerical staff and front door checkers" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1

1227-98-R: Teamsters Local Union No. 419 (Applicant) v. Star Disposal Equipment Co. Ltd. (Respondent)

Unit: "all employees of Star Disposal Equipment Co. Ltd. in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

1239-98-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Edcore Enterprises (1987) Ltd. c.o.b. as Bee-Clean (Respondent)

Unit: "all employees of Edcore Enterprises (1987) Ltd. c.o.b. Bee-Clean employed at the Court House, 80 Dundas Street, City of London, Ontario, save and except supervisors, persons above the rank of supervisor, sales, clerical and office staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10

1245-98-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Edcore Enterprises (1987) Ltd. c.o.b. Bee-Clean (Respondent)

Unit: "all employees of Edcore Enterprises (1987) Ltd. c.o.b. Bee-Clean employed at 659 Exeter Road, City of London, Ontario, save and except supervisors, persons above the rank of supervisor, sales, clerical and office staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

1258-98-R: United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Applicant) v. Vinyl Window Designs Ltd. (Respondent)

Unit: "all employees of Vinyl Window Designs Ltd. at 300 Chrislea Road, Woodbridge, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff and sales staff" (126 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	128
Number of persons who cast ballots	124

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	122
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	67
Number of ballots marked against applicant	57

1291-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. Accord Manufacturing Corporation (Respondent)

Unit: "all employees of the Employer employed by Accord Maintenance Corporation, in the Regional Municipality of York, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff and students" (20 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	5

1307-98-R: Communications, Energy and Paperworkers Union of Canada (CEP) (Applicant) v. Union Gas Limited (Respondent)

Unit: "all office and clerical employees of Union Gas Limited in the City of Hamilton, Town of Ancaster, Town of Milton and City of Burlington, save and except Assistant Supervisor, those above the rank of Assistant Supervisor and Project Engineers, Analysts, Human Resources and Safety Clerk, Safety Representative, and secretaries to the Manager - Hamilton/Halton Division, General Manager - Eastern Region, Manager - Delivery Services, Manager - Business Development, Manager - Support Services, Manager - Customer Contact and the Human Resources Manager" (108 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	139
Number of persons who cast ballots	121
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	117
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	96
Number of ballots marked against applicant	25

Applications for Certification Dismissed Subsequent to Vote

0560-97-R: United Food and Commercial Workers Union, Local 1977 (Applicant) v. White Rose Crafts and Nursery Sales Limited (Respondent)

Unit: "all employees of White Rose Crafts and Nursery Sales Limited employed at 525 Hespeler Street, Cambridge, Ontario, N1R 6J2, save and except the manager, the assistant manager, persons above the rank of assistant manager, and summer seasonal employees" (44 employees in unit)

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	9

3596-97-R: The Ontario Laundry Drivers Union (Applicant) v. Work Wear Corporation of Canada, Ltd. a subsidiary of G & K Services Inc., Cambridge Unit (Respondent) v. The United Food and Commercial Workers Union, Local 351, Laundry, Linen Drivers and Industrial Workers Union Local 847 (Intervenors)

Unit: "all employees of Work Wear Corporation of Canada, Ltd. at 205 Turnbull Court, in Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons employed for not more than 20 hours a week." (121 employees in unit)

0493-98-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Sensor Switch Toronto Inc. and/or Sensor Switch Canada Inc. and/or Energy Watch Inc. (Respondent)

Unit: "all journeymen electricians and electricians' apprentices in the employ of Sensor Switch Toronto Inc. and/or Sensor Switch Canada Inc. and/or Energy Watch Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen electricians and electricians' apprentices in the employ of Sensor Switch Toronto Inc. and/or Sensor Switch Canada Inc. and/or Energy Watch Inc. in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non- working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	6

0810-98-R: Ontario Public Service Employees Union (Applicant) v. Participation House Project - Waterloo Region (Respondent)

Unit: "all employees of Participation House in the City of Kitchener, save and except supervisors and persons above the rank of supervisor" (46 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	1

0931-98-R: United Food and Commercial Workers Union Local 333 (Applicant) v. Hospitality Motels Limited c.o.b. as the Days Inn Hotel (Respondent)

Unit: "all employees of the Days Inn located at 6361 Buchanan Ave., Niagara Falls, Ont. save and except supervisors, those above the rank of supervisor, office clerical staff and office sales staff" (60 employees in unit)

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	35
Number of ballots segregated and not counted	9

0973-98-R: United Steelworkers of America (Applicant) v. Bartell Industries Inc. (Respondent)

Unit: "all employees of Bartell Industries Inc. in the Regional Municipality of Peel excluding office, clerical and technical staff, Plant Manager, and person above the rank of Plant Manager" (75 employees in unit)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	69
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	64
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	38
Number of ballots segregated and not counted	9

1203-98-R: Christian Labour Association of Canada (Applicant) v. Goderich Place Retirement Residence (Respondent) v. Service Employees International Union - Local 210 (incumbent Union)

Unit: "all employees of the Goderich Place Retirement Residence at Goderich, Ontario, save and except supervisors and persons above the rank of supervisor" (26 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	15
Number of ballots segregated and not counted	0

1216-98-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599 (Applicant) v. Simcoe Mechanical Contracting (1986) Limited (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Simcoe Mechanical Contracting (1986) Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Simcoe Mechanical Contracting (1986) Limited in all other sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

1260-98-R: Industrial and Commercial Workers' Union (UNITE) (Applicant) v. Satisfied Brake Products Inc. (Respondent)

Unit: "all employees of Satisfied Brake Products Inc. in the City of Cornwall, save and except supervisors and persons above the rank of supervisor and office, sales and clerical staff and students employed during the school vacation period" (384 employees in unit)

Number of names of persons on revised voters' list	384
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Number of persons who cast ballots	368
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	318
Number of segregated ballots cast by persons whose names appear on voter's list	48
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	271
Number of ballots segregated and not counted	49

1261-98-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Astro Dairy Products Limited (Respondent)

Unit: "all employees of Astro Dairy Products Limited at its plant at 25 Rakely Court, Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales, lab and quality assurance staff and truck drivers" (91 employees in unit)

Number of names of persons on revised voters' list	91
Number of persons who cast ballots	93
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	84
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	50
Number of ballots segregated and not counted	8

1310-98-R: Labourers' International Union Of North America, Local 527 (Applicant) v. Boucher Precast Concrete Limited (Respondent)

Unit: "all employees employed by Boucher Precast Concrete Limited, except supervisors, those above the rank of supervisor, office and clerical employees" (14 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	1

1312-98-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. 595799 Ontario Limited - Bytown Investments (c.o.b. The Business Inn) (Respondent)

Unit: "all employees of 595799 Ontario Limited - Bytown Investments (c.o.b. The Business Inn) in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, front desk, office and sales staff" (18 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	3

Applications for Certification Withdrawn

0136-98-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Ermacon Contracting Inc. (Respondent)

0159-98-R: Ontario Liquor Board Employees' Union (Applicant) v. Ambassador Duty Free Management Services Ltd. c.o.b. as The Ambassador Duty Free Store (Respondent)

1364-98-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 221 (Applicant) v. 995582 Ontario Inc. cob as Allen Plumbing and Heating (Respondent)

1373-98-R: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Glaziers) (Applicant) v. Commercial Glass & Aluminum Co. Ltd. (Respondent)

1553-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cormar Contracting Limited and/or Cormar(1996) Contracting (Div. of 1180930 Ontario Inc.) (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3771-95-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Locals 221 and 46 (Applicant) v. PCL Employees Holdings Ltd., PCL Construction Holdings Ltd., PCL Construction Resources Inc., PCL Construction Group Inc., PCL Constructors Inc., PCL Industrial Constructors Inc., PCL Industrial Construction Ltd., PCL Constructors Western Inc., PCL Constructors Eastern Inc., PCL Civil Constructors (Canada) Inc., PCL Construction Management Inc., and PCL Engineering Construction Inc. (Respondents) (*Granted*)

4039-95-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. Crocodile Labour Services Inc./NASCO Services Inc., Universal Concerts Canada (formerly MCA Concerts Canada) (Respondents) v. Victoria M. Desroches (Intervener) (*Endorsed Settlement*)

3878-96-R: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Peel Steel Ltd., Peel Steel (Northern) Limited, Tower Steel Company Ltd. (Respondents) (*Withdrawn*)

0551-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. M.C.A. Carpentry Ltd., Triden Carpentry Ltd. (Respondents) (*Granted*)

3495-97-R; 3940-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Maramar Marble Inc., East Tiles Co. Ltd., Bertoia Tiles (Respondents); International Union of Bricklayers and Allied Craftsmen Local 31 (Applicant) v. Maramar Marble Inc., Maple Terrazzo Marble & Tile Incorporated and Bertoia Tile (Respondents) (*Terminated*)

3603-97-R: International Brotherhood of Painters and Allied Trades, Local 1819 (Applicant) v. Balkan Glass & Aluminum Inc. and D & S Glass Installations Inc. (Respondents) (*Granted*)

4831-97-R: Communications, Energy and Paperworkers Union of Canada, Local 102-0 (Applicant) v. D.F.R. Printing, a Division of Runge Publishing Inc., Advantage Copy Centre and Custom Printers of Renfrew Ltd. (Respondents) (*Withdrawn*)

0252-98-R: United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) (Applicant) v. Washington Mills Electro Minerals Corp. (Respondent) (*Withdrawn*)

0327-98-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Trojan Forming Company Limited ("Trojan"), Trojan Forming Company (1991) Limited ("Trojan 91"), Maplecrete Construction Company Limited ("Maplecrete"), Italform Construction Limited ("Italform") (Respondents) (*Withdrawn*)

0533-98-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Gus Mechanical Engineering Inc., Irsun Mechanical Ltd., Airtemp Improvement Ltd., 1200037 Ontario Inc. c.o.b. as RGM Group Inc., (sic) and/or RGM Group (Respondents) (*Withdrawn*)

0814-98-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 and Luc Larose (Applicant) v. Ormesher Decor Construction Ltd., Ormesher Decor (1980) Ltd., Decor Insulation and Drywall Ltd., L. Nicolini & Associates Ltd., Nicolini Construction Inc. and Nicolini Construction & Engineering Ltd. and Joe Perras (Respondents) (*Endorsed Settlement*)

0816-98-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 4 (Applicant) v. United Masonry and 761203 Ontario Inc. c.o.b. as Schafer Masonry and Dieter Schafer (Respondents) (*Endorsed Settlement*)

1255-98-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B.C. Finish Carpentry Co., Diogo Trim Inc. (Respondents) (*Granted*)

SALE OF A BUSINESS

3771-95-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Locals 221 and 46 (Applicant) v. PCL Employees Holdings Ltd., PCL Construction Holdings Ltd., PCL Construction Resources Inc., PCL Construction Group Inc., PCL Constructors Inc., PCL Industrial Constructors Inc., PCL Industrial Construction Ltd., PCL Constructors Western Inc., PCL Constructors Eastern Inc., PCL Civil Constructors (Canada) Inc., PCL Construction Management Inc., and PCL Engineering Construction Inc. (Respondents) (*Granted*)

3878-96-R: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Peel Steel Ltd., Peel Steel (Northern) Limited, Tower Steel Company Ltd. (Respondents) (*Withdrawn*)

0551-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. M.C.A. Carpentry Ltd., Triden Carpentry Ltd. (Respondents) (*Granted*)

3495-97-R; 3940-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Maramar Marble Inc., East Tiles Co. Ltd., Bertoia Tiles (Respondents); International Union of Bricklayers and Allied Craftsmen Local 31 (Applicant) v. Maramar Marble Inc., Maple Terrazzo Marble & Tile Incorporated and Bertoia Tile (Respondents) (*Terminated*)

3603-97-R: International Brotherhood of Painters and Allied Trades, Local 1819 (Applicant) v. Balkan Glass & Aluminum Inc. and D & S Glass Installations Inc. (Respondents) (*Granted*)

4831-97-R: Communications, Energy and Paperworkers Union of Canada, Local 102-0 (Applicant) v. D.F.R. Printing, a Division of Runge Publishing Inc., Advantage Copy Centre and Custom Printers of Renfrew Ltd. (Respondents) (*Withdrawn*)

0252-98-R: United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) (Applicant) v. Washington Mills Electro Minerals Corp. (Respondent) (*Withdrawn*)

0327-98-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Trojan Forming Company Limited ("Trojan"), Trojan Forming Company (1991) Limited ("Trojan

91”), Maplecrete Construction Company Limited (“Maplecrete”), Italform Construction Limited (“Italform”) (Respondents) (*Withdrawn*)

0533-98-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Gus Mechanical Engineering Inc., Irsun Mechanical Ltd., Airtemp Improvement Ltd., 1200037 Ontario Inc. c.o.b. as RGM Group Inc., (sic) and/or RGM Group (Respondents) (*Withdrawn*)

0816-98-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 4 (Applicant) v. United Masonry and 761203 Ontario Inc. c.o.b. as Schafer Masonry and Dieter Schafer (Respondents) (*Endorsed Settlement*)

1255-98-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B.C. Finish Carpentry Co., Diogo Trim Inc. (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

1259-98-R: Canadian Union of Public Employees, Local 79 (Applicant) v. Toronto Public Library Board (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3891-95-R: Ontario Hydro (Applicant) v. Power Workers’ Union (Respondent) (*Withdrawn*)

4009-95-R: Kenora Association for Community Living (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

3616-97-R: Tom McCarthy (Applicant) v. The International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 251 (Respondent) v. Injectech Industries Inc. (Intervener)

Unit: “all employees of Injectech Industries Inc. in the City of Barrie, save and except area supervisors, persons above the rank of area supervisors, office, clerical and sales staff.” (85 employees in unit) (*Dismissed*)

Number of names of persons on revised voters’ list	85
Number of persons who cast ballots	79
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	79
Number of ballots marked in favour of respondent	42
Number of ballots marked against respondent	37

4455-97-R: Donna Harley (Applicant) v. Brewery General and Professional Workers’ Union, Local 22 (Respondent) v. 1019491 Ontario Ltd., 1264316 Ontario Inc. (Howard Johnson Hotel, Perkins and Wrigley’s Field) (Intervener) (*Withdrawn*)

4815-97-R: Matthias Dierstein (Applicant) v. IBEW Construction Council of Ontario - Local Union 804 and IBEW Construction Council of Ontario (Respondents) v. Del-Co Electrical Inc. (Intervener)

Unit: “all electricians and electricians’ apprentices in the employ of Del-Co Electrical Ltd.: (i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and (ii) in all other sectors of the construction industry save and except the industrial, commercial and institutional sector in the Counties of Bruce, Grey, Dufferin, Perth, Waterloo, Wellington and Waterloo, Wellington and Halton north of 401 Highway (O.L.R.B. Geographic Areas 3, 6, 7, 27 and 28), save and except non-working forepersons and persons above the rank of non-working foreperson” (2 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2

Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

0416-98-R: Todd Lawlor (Applicant) v. The International Brotherhood of Painters and Allied Trades, Local 200 and The Ontario Council of the International Brotherhood of Painters & Allied Trades (Respondent) v. Crautek Glass & Aluminum Ltd. (Intervener) (*Withdrawn*)

0434-98-R: Chad Whiteman, also representing Charles Whiteman and Frank MacEachen (Applicant) v. Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (formerly the Ontario Provincial Council) (Respondent) v. Irwin Seating Company Inc. (Intervener)

Unit: "all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (0 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	2
Number of ballots marked against respondent	2

0877-98-R: In-Soon Shin and Mark Malakooti (Applicant) v. United Food and Commercial Workers International Union, Local 175 & 633 (Respondent) v. Russo Foods 90 Limited (Intervener)

Unit #1: "all employees of Russo Foods 90 Limited in the Municipality of Metropolitan Toronto, save and except department manager, persons above the rank of department manager, warehouse employees, truck drivers, controller, confidential executive secretary, and commission sales staff - and - Unit #2: "all employees of Russo Foods 90 Limited in the Municipality of Metropolitan Toronto, save and except Distribution Manager and persons above the rank of Distribution Manager." (12 employees in unit) (*Granted*)

1165-98-R: Mr. Horatio Edwards, Representative of the Employees of Brucefield Manor Retirement Home (Applicant) v. Christian Labour Association of Canada (Respondent) (*Granted*)

1235-98-R: Cheryl Caldwell (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Sea Land Holding Corporation c.o.b. as The Great Lakes College of Toronto (Intervener)

Unit: "all employees of Sea Land Holding Corp., carrying on business as The Great Lakes College of Toronto, in the City of Toronto engaged in a teaching capacity, save and except the Director, Assistant Director, Vice Principal, Dean, Tutor, Admissions Officer, persons above the rank of Vice-Principal, maintenance staff, and clerical staff" (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked against respondent	6

1246-98-R: Cathy Gascoyne (Applicant) v. International Brotherhood of Electrical Workers, Local 636 (Respondent) v. Windsor Regional Hospital (Intervener) (*Dismissed*)

1424-98-R: Eustace Morris (Applicant) v. United Steelworkers of America Local 9038 (Respondent) v. D & M Building Supplies Limited (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1418-98-U: Canadian Bank Note Company, Limited (Applicant) v. Graphic Communications Union, Local 41M, Graphic Communications International Union, Local 588, Litho/Typemen; Graphic Communications Union, Local 588, Bindery I, and Graphic Communications Union, Local 588, Bindery II (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1396-98-U: BFC Industrial-Nicholls Radtke Ltd. (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 593, International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, International Brotherhood of Electrical Workers Local Union 120, London, Millwright Local 1592, Fred Allegeart, Chris Kelly, Thomas Doucette, Mark Porter, Gordon Frampton, Roger Landry, David Parr, Martin Wetzel, Guy Krisza, Charles Jarrett, Peter Tangen and Denis Beaupre (Respondents) (*Endorsed Settlement*)

1430-98-U: Adam Clark Company Ltd. (Applicant) v. International Union of Operating Engineers, Local 793 and Bruce Knight and Others (Respondent) (*Granted*)

1454-98-U: BFC Industrial - Nicholls Radtke Ltd. (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 593, International Union of Operating Engineers, Local 793, Bruce Knight, John Payne and Appendix C (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

4090-97-U; 1467-98-U: IWA Canada Local 2693 (Applicant) v. E. B. Eddy Forest Products Limited (Respondent) (*Endorsed Settlement*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3051-90-U: Graham Smith, Allen Ouellette and Charles Wilburn (Applicant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Respondent) (*Granted*)

2780-95-U: Ellis-Don Construction Ltd. (Applicant) v. Labourers International Union of North America, Local 1089 and Robert Leone (Respondents) v. United Brotherhood of Carpenters & Joiners of America, Local 1256 (Intervener) (*Granted*)

3829-95-U; 0675-96-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto and T.C. Sclocco (Applicant) v. Crocodile Labour Services Inc./NASCO Services Inc., Universal Concerts Canada (formerly MCA Concerts Canada) (Respondents) v. Victoria M. Desroches (Intervener); International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. Crocodile Labour Services Inc./NASCO Services Inc. (Respondent) (*Endorsed Settlement*)

3055-96-U: United Food and Commercial Workers International Union, Local 550A (Applicant) v. Mott's Canada, A Division of Cadbury Beverages Canada Inc. (Respondent) (*Withdrawn*)

3354-96-U: Malcolm Fullwood, Bill Adair and Vince Oragano on behalf of all DPSP Members (Applicant) v. United Food and Commercial Workers Locals 175 and 633 (Respondent) v. The Great Atlantic & Pacific Company of Canada, Limited (Intervener) (*Dismissed*)

1365-97-U: Sheetmetal Workers' International Association and Ontario Sheetmetal Workers' Conference for Local 47 (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd. c.o.b. as Mount Royal Contracting, D.M.B. Contracting, M.B. Contracting (Respondents) (*Granted*)

2332-97-U: United Food and Commercial Workers International Union, Local 1977 (Applicant) v. White Rose Crafts & Nursery Sales Limited (Respondent) (*Terminated*)

2389-97-U: Eddy Laroche (Applicant) v. Helen Fetterly - CUPE 783 (Respondent) (*Withdrawn*)

2557-97-U: Ontario Public Service Employees Union (Applicant) v. Victorian Order of Nurses Hamilton Wentworth Branch (Respondent) (*Withdrawn*)

2709-97-U: Association of Management, Administrative and Professional Crown Employees of Ontario (Applicant) v. The Crown in Right of Ontario, as represented by Management Board of Cabinet (Respondent) (*Withdrawn*)

2716-97-U: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 (Applicant) v. Towertropolis Inc. c.o.b. as the Minolta Tower Centre (Respondent) (*Withdrawn*)

3037-97-U: Abraham Kandankery (Applicant) v. United Steelworkers of America (Respondent) v. Pinkertons' of Canada Limited (Intervener) (*Dismissed*)

3093-97-U: William P. Curry (Applicant) v. The Ottawa Construction Association (Respondent) v. United Brotherhood of Carpenters and Joiners of America (Intervener) (*Withdrawn*)

3319-97-U: Gordon N. Googoo (Applicant) v. CAW Union Local 385 (Respondent) v. Coca-Cola Bottling Ltd. (Intervener) (*Withdrawn*)

3386-97-U: Maurizio Pollastrone (Applicant) v. United Steelworkers of America (Respondent) v. Grand & Toy Limited (Intervener) (*Withdrawn*)

3514-97-U: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers, Jerry Coelho and Tom Oldham, International Union of Bricklayers and Allied Craftworkers, Local 1 and Kerry Wilson, International Union of Bricklayers and Allied Craftworkers, Local 2 and Danilo Buttazzoni, International Union of Bricklayers and Allied Craftworkers, Local 5 and John Haggis (Applicants) v. International Union of Bricklayers and Allied Craftworkers, John T. Joyce, John J. Flynn, Frank Stupar, James Bowland and Michael Carlander and International Union of Bricklayers and Allied Craftworkers Local Union Officers and Employees Pension Plan of Canada (Respondents) (*Granted*)

3517-97-U; 4832-97-U: Communications, Energy and Paperworkers Local 102-0 (Applicant) v. DFR Printing A Division of Runge Newspapers Inc. (Respondent); Communications, Energy and Paperworkers Union of Canada, Local 102-0 (Applicant) v. DFR Printing A Division of Runge Publishing Inc., Advantage Copy Centre and Custom Printers of Renfrew Ltd. (Respondents) (*Withdrawn*)

3755-97-U; 4295-97-U: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Fairview Nursing Home (Ltd.) (Respondent) (*Withdrawn*)

3861-97-U: Rick Johnson (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Withdrawn*)

4091-97-U; 1154-98-U: IWA Canada Local 2693 (Applicant) v. E.B. Eddy Forest Products Limited (Respondent) (*Endorsed Settlement*)

4136-97-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Sears Canada Inc. (Respondent) (*Withdrawn*)

4376-97-U: Stan Griffiths (Applicant) v. Canadian Union of Public Employees, Local 54 and The Corporation of the Town of Ajax (Respondents) (*Withdrawn*)

4384-97-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Standard Masonry (Respondent) (*Granted*)

4478-97-U: M.T. Mullins (Applicant) v. Canadian Union of Public Employees and Local 27 C.U.P.E. (Respondent) (*Withdrawn*)

4564-97-U: David Cicci, Peter Matesic (Applicant) v. Construction Workers Local 6, Christian Labour Association of Canada, Besseling Mechanical Inc. (Respondents) (*Withdrawn*)

4652-97-U: Canadian Union of Public Employees, Local 2899 (Applicant) v. St. Joseph Nursing Home (Respondent) (*Withdrawn*)

4663-97-U; 4755-97-U; 0251-98-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Goreski Roofing and Lathing Ltd. (Respondent); Goreski Roofing and Lathing Ltd. (Applicant) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent); Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and Frank Stewart (Applicant) v. Goreski Roofing & Lathing Ltd. (Respondent) (*Withdrawn*)

4736-97-U; 4738-97-U: Tom Dimopoulos (Applicant) v. CAW-Canada Local 385 (Respondent) v. Coca-Cola Bottling Ltd. (Intervener); Zoran Panizovski (Applicant) v. CAW-Canada Local 385 (Respondent) v. Coca-Cola Bottling Ltd. (Intervener) (*Dismissed*)

4774-97-U: Kenneth Aldridge (Applicant) v. Steelworkers Local 6720 and Collins and Aikman Plastics (formerly Manchester Plastics) (Respondents) (*Withdrawn*)

4824-97-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Dorval Mechanical Inc. (Respondent) (*Withdrawn*)

4881-97-U: Peter Froehlich (Applicant) v. Local 204 Service Employees International Union (Respondent) v. Robin Nicholas and Clarke Division of Addiction and Mental Health Services Corporation (Intervener) (*Withdrawn*)

4908-97-U: Office and Professional Employees International Union, Local 343 (Applicant) v. Avestel Credit Union Limited (Respondent) (*Withdrawn*)

4946-97-U: Brewery, General and Professional Workers' Union (Applicant) v. 1019491 Ontario Ltd., 1264316 Ontario Inc. (Howard Johnson Hotel, Perkins and Wrigley's Field) (Respondent) (*Withdrawn*)

4979-97-U: Guilhermina De Arbreu (Applicant) v. Toronto Industrial Council, United Food and Commercial Workers International Union, Local 709-3 (Respondent) v. National Meats (Intervener) (*Dismissed*)

5007-97-U: Ontario Public Service Employees Union (in its own behalf, and on behalf of Bob Plouff) (Applicant) v. Alcohol and Gaming Commission of Ontario (Respondent) (*Withdrawn*)

5023-97-U: Amina Budhoo (Applicant) v. CAW Canada (Respondent) v. Long Manufacturing Ltd. (Intervener) (*Withdrawn*)

0008-98-U: United Food and Commercial Workers International Union, Local 1993 (Applicant) v. Horti-Pak Inc. (Respondent) (*Withdrawn*)

0078-98-U: Chris Sumbler (Applicant) v. Teamsters Union Local 424 (Respondent) (*Withdrawn*)

0111-98-U: Alan Bennett (Applicant) v. Ontario Public Service Employees Union and The Government of Ontario in Right of the Ministry of Community and Social Services (Respondents) (*Dismissed*)

0114-98-U: United Steelworkers of America (Applicant) v. Mega Blow Mouldings Ltd. (Respondent) (*Withdrawn*)

0213-98-U: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Ermacon Contracting Inc. and Carmine Nigro (Respondent) (*Withdrawn*)

0243-98-U: Leticia Vaudry (Applicant) v. Pembroke General Hospital Inc. and Canadian Union of Public Employees, Local 1502 (Respondents) (*Withdrawn*)

0253-98-U: United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) (Applicant) v. Washington Mills Electro Minerals Corp. (Respondent) (*Withdrawn*)

0298-98-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Russo Foods 90 Limited (Respondent) (*Withdrawn*)

0378-98-U: Antunes Fernando (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

0409-98-U: Sandra Pedersen (Applicant) v. Welland Hydro-Electric Commission, and Local Union 636 of the International Brotherhood of Electrical Workers (Respondents) (*Dismissed*)

0444-98-U: Gail Walker Part-time Case Manager Windsor/Essex Community Care Access Centre O.N.A. Local 33 (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

0469-98-U: Douglas Hudson (Applicant) v. American Federation of Grain Millers International Union - Local 242 (Respondent) v. Beta Brands Limited (Intervener) (*Withdrawn*)

0479-98-U: Communications, Energy and Paperworkers Union Local 492 on behalf of Allan Rose (Applicant) v. Strathcona Paper Company (Respondent) (*Withdrawn*)

0482-98-U: Robert Barr (Applicant) v. International Brotherhood of Electrical Workers, Local 586, International Brotherhood of Electrical Workers, Construction Council of Ontario (Respondents) (*Withdrawn*)

0551-98-U: Canadian Union of Public Employees and Its Local 4000 Carling Avenue Site #1 (Formerly Local 576) (Applicant) v. The Ottawa Hospital (Respondent) (*Withdrawn*)

0713-98-U: United Steelworkers of America (Applicant) v. Digital Security Controls Ltd. (Respondent) (*Withdrawn*)

0813-98-U: United Brotherhood of Carpenters and Joiners of America, Local 2041 and Luc Larose (Applicant) v. Ormesher Decor Construction Ltd., Ormesher Decor (1980) Ltd., Decor Insulation and Drywall Ltd, L. Nicolini & Associates Ltd., Nicolini Construction Inc. and Nicolini Construction & Engineering Ltd., Joe Perras (Respondents) (*Withdrawn*)

0815-98-U: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 4 (Applicant) v. United Masonry and 761203 Ontario Inc. c.o.b. as Schafer Masonry and Dieter Schafer (Respondents) (*Withdrawn*)

0925-98-U: Labourers' International Union of North America, Local 1036 and Thomas J. Solomon (Applicant) v. Kvaerner Sheaffer Townsend Limited and Michael Cook Carol E. Derk, James D. Ealy, Gary M. Simms, Paul J. Songer, Fred Kucinic, and Gabe Costa (Respondent) (*Withdrawn*)

0954-98-U: Michael Vorobej (Applicant) v. The Recreation Association of the Public Service of Canada (Respondent) (*Withdrawn*)

0974-98-U: United Steelworkers of America (Applicant) v. Bartell Industries Inc. (Respondent) (*Withdrawn*)

1013-98-U: Gregory Gifford (Applicant) v. Stanley Canada, Inc., Mechanics Tools Division (Smiths Falls Plant) and the Stanley Tools Employees Association (Respondents) (*Withdrawn*)

1021-98-U: Christian Labour Association of Canada (Applicant) v. Caressant Care Nursing Homes Limited cob The Maples Home for Seniors (Respondent) (*Withdrawn*)

1059-98-U: Ontario Public Service Employees Union (Applicant) v. Bluewater District School Board (Respondent) (*Withdrawn*)

1153-98-U: Larry Rezansoff (Applicant) v. United Brotherhood of Carpenters and Joiners of America (Respondent) (*Dismissed*)

1181-98-U: Graphic Communications Union, Local 41M Graphic Communications International Union, Local 588 (Applicant) v. Canadian Bank Note Company Limited (Respondent) (*Withdrawn*)

1187-98-U: Mohamed T. Unoos (Applicant) v. H.E.R.E. Local 75 (Respondent) (*Dismissed*)

1188-98-U: International Union United Automobile, Aerospace and Agricultural Implement Workers of America UAW Local 251 (Applicant) v. Unitec Inc. 629728 Ontario Ltd. Operating as Entropex (Respondent) (*Withdrawn*)

1194-98-U: Wayne Trudeau (Applicant) v. General Motors of Canada Limited (Respondent) (*Dismissed*)

1204-98-U: Roland Lancing (Applicant) v. United Steelworkers of America (Respondent) (*Dismissed*)

1279-98-U: Janet Watts, All Affected Members (Applicant) v. CHCW - Joe Daignault (Respondent) (*Dismissed*)

1281-98-U: Hans Jensen (Applicant) v. ATU Local 107 (Respondent) (*Dismissed*)

1292-98-U: Michael John Bolton (Applicant) v. Quality Meat Packers Ltd. (Respondent) (*Dismissed*)

1298-98-U: Vivian Leps (Applicant) v. AMR Services & Union Local 2213 (Respondents) (*Withdrawn*)

1299-98-U: Iwan Frank (Applicant) v. Hotel and Restaurant Union, Local 75 (Respondent) (*Terminated*)

1337-98-U: Royal Ottawa Health Care Group ("ROHCG") (Applicant) v. Canadian Union of Public Employees, Local 942 ("CUPE") and Jim Ritchie (Respondent) (*Dismissed*)

1419-98-U: Canadian Bank Note Company, Limited (Applicant) v. Graphic Communications Union, Local 41M, Graphic Communications International Union, Local 588, Litho/Typemen; Graphic Communications Union, Local 588, Bindery I, and Graphic Communications Union, Local 588, Bindery II (Respondents) (*Withdrawn*)

1441-98-U: John Robert Coppins (Applicant) v. Cryogenic Drivers Association and Alliance Drivers Service and Praxair Canada Inc. (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

4643-97-M: David Cicci, Peter Matesic (Applicant) v. Construction Workers Local 6, Christian Labour Association of Canada, Besseling Mechanical Inc. (Respondents) (*Withdrawn*)

1209-98-M: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Dorval Mechanical Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

4939-97-U: Brewery, General and Professional Workers' Union (Applicant) v. 1019491 Ontario Ltd., 1264316 Ontario Inc. (Howard Johnson Hotel, Perkins and Wrigley's Field) (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0402-98-M: United Food and Commercial Workers Union, Local 351 (Applicant) v. Ridgewood Industries (Respondent) (*Granted*)

1075-98-M: Canadian Linen Supply - Windsor (Applicant) v. United Food and Commercial Workers International Union, Local 351 (Respondent) (*Granted*)

1295-98-M: United Food and Commercial Workers International Union, Local 351 (Applicant) v. Essex Linen (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

3587-95-JD: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1089 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1256 and Ellis-Don Construction Ltd. and (Respondents) (*Terminated*)

0988-97-JD: International Union of Bricklayers and Allied Craftworkers, Local 10 (Applicant) v. Phoenix Restoration, A Division of Phoenix Gunite Services Limited and Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local 598 (Respondents) (*Granted*)

4462-97-JD: United Brotherhood of Carpenters and Joiners of America, Local 1256 ("Carpenters") (Applicant) v. Doug Chalmers Construction Limited ("Chalmers") and Labourers' International Union of North America, Local 1089 ("Labourers") (Respondents) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0046-98-OH: Tammy Fantauzzi (Applicant) v. Micromedia Limited (Respondent) (*Withdrawn*)

0056-98-OH: Paul W. Russel (Applicant) v. Tim Hortons, Richard Cooper (Respondents) (*Withdrawn*)

0542-98-OH: Diane Reid (Applicant) v. The Workplace Safety and Insurance Board (Respondent) (*Withdrawn*)

0556-98-OH: Jennifer Tinson (Applicant) v. Overhead Crane Service and Supply Co. Ltd., and Christopher White (Respondent) (*Withdrawn*)

1126-98-OH: Deidre Beatty (Applicant) v. International Hearing Aids Limited (Respondent) (*Withdrawn*)

1160-98-OH: Mark Binkley and Central Landscaping (Applicant) v. Central Maint. and Contracting (Respondent) (*Dismissed*)

1162-98-OH: Jim Mercer (Applicant) v. Battle Mountain Gold, Hemlo Golden Giant Mine (Respondent) (*Withdrawn*)

1294-98-OH: Rosanne DiDomenici (Applicant) v. HR Vision Corporation (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

3879-96-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Tower Steel Company Ltd. (Respondent) (*Withdrawn*)

1455-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 615079 Ontario Limited c.o.b. as Harris Electric, Mapleton Electric Limited, Rama Electric Ltd., DMZ Electric Ltd. and Maza Electric Ltd. (Respondents) (*Endorsed Settlement*)

1954-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Trisar Sheet Metal Limited, Trisar Refrigeration Limited, Honeywell Limited (Respondents) (*Withdrawn*)

3038-97-G; 3042-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. International Contractors Inc. and Marvin & Sinclair Developments Inc. (Respondents) (*Endorsed Settlement*)

3162-97-G: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Leader Plumbing & Heating Inc. (Respondent) (*Endorsed Settlement*)

3494-97-G; 3716-97-G; 3939-97-G: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Maramar Marble Inc., East Tiles Co. Ltd. and Bertoia Tiles (Respondents); International Union of Bricklayers and Allied Craftsmen Local 31 (Applicant) v. Maramar Marble Inc., Maple Terrazzo Marble & Tile Incorporated and Bertoia Tile (Respondents) (*Terminated*)

3601-97-G; 3602-97-G: International Brotherhood of Painters and Allied Trades, Local 1819 (Applicant) v. Balkan Glass & Aluminum Inc. and D & S Glass Installations Inc. (Respondents) (*Endorsed Settlement*)

3716-97-G: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Maramar Marble Inc., East Tiles Co. Ltd. and Bertoia Tiles (Respondents) (*Terminated*)

4157-97-G: Labourers' International Union of North America, Local 506 (Applicant) v. Specialty Precast Erectors Limited (Respondent) (*Withdrawn*)

4776-97-G: International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Meteor Painters Contractors (Canada) Ltd. (Respondent) (*Withdrawn*)

4799-97-G: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Besseling Mechanical Inc. (Respondent) v. David Cicci and Peter Matesic (Intervener) (*Withdrawn*)

0019-98-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Norstar Mechanical Ltd. (Respondent) (*Endorsed Settlement*)

0068-98-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oakdale Drywall and Acoustics (Respondent) (*Withdrawn*)

0122-98-G: Labourers' International Union of North America, Local 527 (Applicant) v. Rose Mechanical Limited (Respondent) (*Withdrawn*)

0270-98-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Ormesher Decor (1980) Limited (Respondent) (*Endorsed Settlement*)

0331-98-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Honeywell Limited (Respondent) (*Withdrawn*)

0532-98-G: Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599 (Applicant) v. Gus Mechanical Engineering Inc., Irsun Mechanical Ltd., Airtemp Improvement Ltd., 1200037 Ontario Inc. c.o.b. as RGM Group Inc., (sic) and/or RGM Group (Respondents) (*Withdrawn*)

0709-98-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Marman Mechanical Inc. (Respondent) (*Granted*)

0745-98-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Speed Electric Limited (Respondent) (*Endorsed Settlement*)

0769-98-G: Labourers' International Union of North America, Local 837 (Applicant) v. OBN Company (9991877 Ontario Limited) and Bono General Construction Co. Ltd. (Respondents) (*Granted*)

- 0817-98-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 4 (Applicant) v. United Masonry and 761203 Ontario Inc. c.o.b. as Schafer Masonry and Dieter Schafer (Respondents) (*Withdrawn*)
- 0927-98-G:** Labourers' International Union of North America, Local 1036 (Applicant) v. Kvaerner Sheaffer Townsend Limited (Respondent) (*Withdrawn*)
- 0965-98-G:** Del-Co Electrical Inc. (Applicant) v. I.B.E.W. Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 804 (Respondents) (*Withdrawn*)
- 0972-98-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 593601 Ontario Ltd. o/a Domingos Contractors Carpentry (Respondent) (*Granted*)
- 0980-98-G:** International Union of Bricklayers and Allied Craftsmen, Local 2, Toronto/Barrie, Ontario (Applicant) v. Limen Masonry Ltd. (Respondent) (*Granted*)
- 0981-98-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1210166 Ontario Inc. o/a DCC Carpentry (Respondent) (*Granted*)
- 1052-98-G:** International Union of Bricklayers and Allied Craftsmen, Local 2, Toronto/Barrie, Ontario (Applicant) v. Eastern Construction Company Ltd. (Respondent) (*Withdrawn*)
- 1107-98-G:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Mirage Steel Limited (Respondent) (*Withdrawn*)
- 1141-98-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fair Electric Contractors Limited and Zapped Electrical Services Inc. (Respondents) (*Endorsed Settlement*)
- 1143-98-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Today Tile & Carpet Ltd. (Respondent) (*Endorsed Settlement*)
- 1152-98-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. B.F.C. Industrial - Nicholls Radtke Ltd. (Respondent) (*Withdrawn*)
- 1155-98-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Par Bros. Ltd. (Respondent) (*Granted*)
- 1158-98-G:** Labourers' International Union of North America, Local 506 (Applicant) v. William Renee Contracting Inc. (Respondent) (*Granted*)
- 1196-98-G:** Teamsters Local Union No. 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. R.B. Somerville (Respondent) (*Endorsed Settlement*)
- 1208-98-G:** International Brotherhood of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Corporate Glass (Respondent) (*Endorsed Settlement*)
- 1240-98-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Memme Construction General Contractor, A Division of Memme Excavation Co. Ltd. (Respondent) (*Withdrawn*)
- 1247-98-G:** International Brotherhood of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Hardie Glass & Aluminum Ltd. (Respondent) (*Endorsed Settlement*)
- 1270-98-G:** International Union of Operating Engineers, Local 793 (Applicant) v. L. Regina Construction Limited (Respondent) (*Granted*)
- 1288-98-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 819 (Applicant) v. Rose Mechanical (Respondent) (*Withdrawn*)

1301-98-G: International Brotherhood of Electrical Workers Local 586 (Applicant) v. Betron Electric Ltd. (Respondent) (*Endorsed Settlement*)

1305-98-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Dynasty Flooring Ltd. (Respondent) (*Withdrawn*)

1314-98-G: International Brotherhood of Electrical Workers Local 586 (Applicant) v. Gordon Bowes and Margaret Bowes c.o.b. as M.G. Crane Service (Respondent) (*Withdrawn*)

1319-98-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Epron Construction Limited (Respondent) (*Granted*)

1320-98-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barclay Tile & Carpet (Respondent) (*Withdrawn*)

1321-98-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pacific Hardwood Flooring (Respondent) (*Withdrawn*)

1334-98-G: International Union of Operating Engineers, Local 793 (Applicant) v. Warren Paving Limited (Respondent) (*Withdrawn*)

1339-98-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cobra Drain & Development Corporation (Respondent) (*Endorsed Settlement*)

1340-98-G: Labourers' International Union of North America, Local 183 (Applicant) v. Aspen Concrete & Drain Inc. (Respondent) (*Endorsed Settlement*)

1343-98-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pro-Drain (1984) Construction Ltd. (Respondent) (*Endorsed Settlement*)

1348-98-G: International Union of Operating Engineers, Local 793 (Applicant) v. Curran Contractors Ltd. (Respondent) (*Endorsed Settlement*)

1359-98-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wall II Wall Stucco Systems Inc. c.o.b. Wall 2 Wall Systems (Respondent) (*Endorsed Settlement*)

1422-98-G: International Brotherhood of Painters and Allied Trades, Local 1819 (Applicant) v. Frank Jonkman & Sons Ltd. (Respondent) (*Endorsed Settlement*)

1445-98-G: Labourers' International Union of North America, Local 183 (Applicant) v. Great Gulf Homes (Respondent) (*Withdrawn*)

1477-98-G: Labourers' International Union of North America, Local 625 (Applicant) v. Eastern Construction Company Limited (Respondent) (*Terminated*)

1494-98-G: Labourers' International Union of North America, Local 506 (Applicant) v. Resici Group Inc. (Respondent) (*Withdrawn*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

4725-97-M: Clover Catering c.o.b. at Barton Place Nursing Home (Applicant) v. Hotel Employees' and Restaurant Employees' Union, Local 75 of H.E.R.E. Int'l Union (Respondent) (*Dismissed*)

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

4417-97-PS: Office & Professional Employees International Union (Applicant) v. Superior North Catholic District School Board, DSB #62 and DSB #34B and Service Employees Union Local 268, affiliated with the A.F. of L., C.I.O. and C.L.C. (Respondents) (*Dismissed*)

4701-97-PS; 4702-97-PS; 4703-97-PS; 4704-97-PS: Greater Essex County District School Board (Applicant) v. The Ontario Secondary School Teachers' Federation, District 1 and The Canadian Union of Public Employees, Local 1348 (Respondents); Greater Essex County District School Board (Applicant) v. Canadian Union of Public Employees, Local 1243 and Canadian Union of Public Employees, Local 27 (Respondents); Greater Essex County District School Board (Applicant) v. The Ontario Secondary School Teachers' Federation, District 1, The Canadian Union of Public Employees, Local 1348 and The Ontario Secondary School Teachers' Federation, District 34 (Respondents); Greater Essex County District School Board (Applicant) v. The Ontario Secondary School Teachers' Federation, District 1, The Ontario Secondary School Teachers' Federation, District 34, Canadian Union of Public Employees, Local 1348.2 (Respondents) (*Granted*)

0395-98-PS: Ontario Secondary School Teachers' Federation (Applicant) v. Huron-Superior Catholic District School Board, The Canadian Union of Public Employees (Respondents) (*Granted*)

0397-98-PS: Ontario Secondary School Teachers' Federation (Applicant) v. Algoma District School Board, Canadian Union of Public Employees, United Food and Commercial Workers, Local 175 (Respondents) (*Granted*)

0485-98-PS: Bluewater District School Board (Applicant) v. Ontario Public Service Employees Union, Ontario Secondary School Teachers' Federation, Canadian Union of Public Employees, Local 1176, Educational Media Resource Technicians' Association (Respondents) (*Granted*)

SECTOR DETERMINATION

0952-98-M: G D Control Inc. (Applicant) v. International Brotherhood of Electrical Workers Construction Council of Ontario (Respondent) (*Dismissed*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2087-96-U: Gino Molinaro (Applicant) v. Canadian Auto Workers, Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) (*Denied*)

4057-96-G: Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 506 (Applicant) v. Ontario Hydro, Parsons Turbine Generator Canada Ltd. and The Electrical Power Systems Construction Association (Respondents) (*Dismissed*)

3269-97-OH: Ali Abdulkadir (Applicant) v. Dough Delight Inc. (Respondent) v. Bakery, Confectionery and Tobacco Workers' International Union, Local 181 (*Denied*)

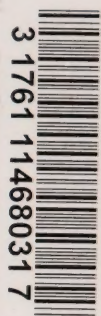
3739-97-U: Damian J. Mills (Applicant) v. United Steelworkers of America Union Local 8694 (Respondent) v. Bertrand Faure Components Limited (Intervener) (*Denied*)

0735-98-U: Bob Burrows (Applicant) v. The Executive of the Ontario Public School Teachers Federation - York Region (OPSTF-YR), The Executive of the York Region Women Teachers Association - (YR-WTA) (Respondents) (*Denied*)

0738-98-G: International Brotherhood of Painters and Allied Trades, Local Union 1824 (Applicant) v. Mike's Painting & Decorating Ltd. (Respondent) (*Denied*)

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